SUPREME COURT, U.S.
FILED
NOV 2 6 2003
OFFICE OF THE CLERK

No. 02-1689

IN THE

Supreme Court of the United States

GRUPO DATAFLUX,

Petitioner,

v.

ATLAS GLOBAL GROUP, L.P., OSCAR ROBLES-CANON, and FRANCISCO LLAMOSA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

ROGER B. GREENBERG
SCHWARTZ JUNELL CAMPBELL & OATHOUT, L.L.P.
Two Houston Center
909 Fannin
Houston, TX 77010
(713) 752-0017

Counsel for Respondents

WILLIAM J. BOYCE
FULBRIGHT & JAWORSKI L.L.P.
1301 McKinney, Suite 5100
Houston, TX 77010-3095
(713) 651-5151

Counsel for Petitioner

PETITION FOR CERTIORARI FILED MAY 14, 2003
CERTIORARI GRANTED OCTOBER 14, 2003

TABLE OF CONTENTS

Page

Appendix A — Relevant Docket Entries Of The United States Court Of Appeals For The Fifth Circuit 1a

Appendix B — Relevant Docket Entries Of The United States District Court For The Southern District Of Texas, Houston 7a

Appendix C — Plaintiff's Original Complaint Filed November 18, 1997 ..... 18a

Appendix D — Defendant's Original Answer And Counterclaim Filed November 30, 1998 ..... 34a

Appendix E — Defendant's Motion To Dismiss For Lack Of Subject Matter Jurisdiction Filed November 8, 2000 ..... 42a

Appendix F — Memorandum In Support Of Defendant's Motion To Dismiss For Lack Of Subject Matter Jurisdiction Filed November 8, 2000 ..... 45a

Appendix G — Plaintiff's Response To Defendant's Motion To Dismiss For Lack Of Subject Matter Jurisdiction Filed November 22, 2000 ..... 83a

Appendix H — Dataflux's Reply To Atlas' Response To Defendant's Motion To Dismiss For Lack Of Subject Matter Jurisdiction Filed November 27, 2000 ..... 110a

Contents

Page

Appendix I — Plaintiff's Sur-Reply To Defendant's Motion To Dismiss For Lack Of Subject Matter Jurisdiction Filed November 28, 2000 ..... 117a

Appendix J — Notice To Correct Immaterial Fact Dated And Filed January 31, 2001 ..... 122a

Contents

Page

The following opinion, memorandum, orders and statute have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for a Writ of Certiorari:

Opinion Of The United States Court Of Appeals For The Fifth Circuit Dated And Filed November 22, 2002 ..... 1a

Memorandum And Order Of The United States District Court For The Southern District Of Texas, Houston Division Dated And Entered December 6, 2000 ..... 20a

Order Of The United States District Court For The Southern District Of Texas, Houston Division Dated And Entered January 5, 2001 ..... 23a

Order Of The United States Court Of Appeals For The Fifth Circuit Denying Petition For Rehearing And Rehearing En Banc Dated And Filed February 17, 2003 ..... 25a

28 U.S.C. § 1332 ..... 27a

APPENDIX A — RELEVANT DOCKET ENTRIES OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ATLAS GLOBAL GROUP V. GRUPO DATAFLUX, ET AL

01-20245

Court of Appeals Docket #: 01-20245
Nsuit: 4190 Contract: Other
Atlas Global Group v. Grupo Dataflux, et al
Appeal from: Southern District of Texas, Houston

- -

Lower court information:

District: 0541-4 : H-97-CV-3779
Trial Judge: Frances H Stacy, US Magistrate Judge
Court Reporter: Bruce Slavin, Court Reporter
Court Reporter: Tape - SR, Sheila Roque
Date Filed: 11/18/97
Date order/judgment: 12/6/00
Date NOA filed: 2/2/01

- -

Fee status: Paid

- -

Prior cases:

None

Current cases:

None

Docket as of May 28, 2003 11:10 pm

Appendix A

ATLAS GLOBAL GROUP, LP Plaintiff - Counter Defendant - Appellant	Roger B Greenberg FAX 713-752-0327 713-752-0017 Suite 2000 [COR LD NTC ret] Schwartz, Junell, Campbell & Oathout 909 Fannin Street 2 Houston Center Houston, TX 77010
OSCAR ROBLES-CANON, officer with Atlas Global Group Counter Defendant - Appellant	Roger B Greenberg (See above) [COR LD NTC ret]
FRANCISCO LLAMOSA, officer with Atlas Global Group Counter Defendant - Appellant	Roger B Greenberg (See above) [COR LD NTC ret]

v.

Appendix A

GRUPO DATAFLUX Defendant - Counter Claimant - Appellee	William Joseph Boyce FAX 713-651-5246 713-651-5151 Suite 5100 [COR LD NTC ret] Julie H Tellepsen 713-651-5151 Suite 5100 [COR NTC ret] Fulbright & Jaworski 1301 McKinney Street Houston, TX 77010-3095
	Mark Allen Robertson FAX 212-318-3400 212-318-3000 [COR NTC ret] Fulbright & Jaworski 666 5th Street New York, NY 10103

Appendix A

01-20245

ATLAS GLOBAL GROUP, LP

Plaintiff - Counter Defendant - Appellant

and

OSCAR ROBLES-CANON, officer with Atlas Global Group; FRANCISCO LLAMOSA, officer with Atlas Global Group

Counter Defendants - Appellants

3/14/01	Private civil diversity case docketed. NOA filed by Appellant Atlas Global Group, Appellant Oscar Robles-Canon, Appellant Francisco Llamosa. [01-20245] (cdd)

* * *

2/6/02	Oral argument heard. Case argued by Roger B Greenberg for Appellant Francisco Llamosa, Appellant Oscar Robles-Canon, Appellant Atlas Global Group, William Joseph Boyce for Appellee Grupo Dataflux [01-20245] (pft)
11/22/02	Opinion filed. If Published # of pages: 5 Issue Mandate due on 12/13/02. [01-20245] (kgc)
11/22/02	Judgment entered and filed. [01-20245] (kgc)
12/6/02	Petition filed by Appellee Grupo Dataflux for rehearing. # of copies filed: 4 [4037592-1] Issue Mandate ddl canceled. Date of COS: 12/5/02 Sufficient [Y/N]: Y [01-20245] (kkf)

Appendix A

12/6/02	Petition filed by Appellee Grupo Dataflux for rehearing en banc. # of copies filed: 20 [4037594-1] Date of COS: 12/5/02 Sufficient [Y/N]: Y [01-20245] (kkf)

* * *

2/17/03	COURT Order filed denying petition for rehearing [4037592-1], denying petition for rehearing en banc [4037594-1] With poll (Y/N)?: N (EMG dissenting for the same reasons as stated in the opinion) Issue Mandate due on 2/24/03. Copies to all counsel. [01-20245] (rjd)
2/24/03	Motion filed by Appellee Grupo Dataflux to stay the issuance of the mandate until 5/19/03 [4109833-1] Response/Opposition due on 3/10/03. Date of COS: 2/21/03 Sufficient [Y/N]: n, no certificate of conference [01-20245] (ams)

* * *

3/25/03	COURT Order filed granting motion to stay mandate pending petition for writ of certiorari until 05/18/03. [4109833-1] The stay is in force until the final disposition of the case by the Supreme Court, provided that the certificate of the Clerk of the Supreme Court advising that the certiorari petition has been filed is also filed with this court within the time stated above. The clerk shall issue a mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of this stay unless the certificate is filed with the clerk

of this court within that time. Issue Mandate ddl updated to 5/20/03. (CES) Copies to all counsel. [01-20245] (jtt)

5/16/03 Notice filed by Appellee Grupo Dataflux advising that 5/15/03, Grupo Dataflux filed its petition for writ of certiorari to the Supreme Court. [4193502-1] [01-20245] (jmw)

5/28/03 Supreme Court notice that petition for certiorari was filed on 05/14/03 by Appellee Grupo Dataflux. Supct No.: 02-1689 [01-20245] (cav)

APPENDIX B — RELEVANT DOCKET ENTRIES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON

U.S. District Court
TXS - Southern District of Texas (Houston)

CIVIL DOCKET FOR CASE #: 97-CV-3779

Atlas Global Group v. Grupo Dataflux

Filed: 11/18/97
Assigned to: Magistrate Judge Frances H Stac ury demand: Plaintiff
Demand: $0,000
Nature of Suit: 190
Lead Docket: None
Jurisdiction: Diversity
Dkt# in other court: None
Cause: 28:1331 Fed. Question: Breach of Contract

ALAN F LEVIN
mediator

Alan F Levin
[NTC] [PRO SE]
Levin, Roth and Kasner, p.c.
500 Summit Tower
Eleven Greenway Plaza
Houston, TX 77046
713/877-1600

Appendix B

==========

ATLAS GLOBAL GROUP, L.P. plaintiff	Roger B Greenberg 713-752-0327 fax [COR LD NTC] Schwartz Junell et al 909 Fannin Ste 2000 Houston, TX 77010 713-752-0017

v.

GRUPO DATAFLUX defendant	Mark Allan Robertson 713-651-5246 [COR LD NTC] Fulbright & Jaworski 1301 McKinney St Ste 5100 Houston, TX 77010-3095 713-651-5232

==========

GRUPO DATAFLUX counter-claimant	Mark Allan Robertson 713-651-5246 [COR LD NTC] Fulbright & Jaworski 1301 McKinney St Ste 5100 Houston, TX 77010-3095 713-651-5232

Appendix B

v.

ATLAS GLOBAL GROUP, L.P. counter-defendant	Roger B Greenberg 713-752-0327 fax [COR LD NTC] Schwartz Junell et al 909 Fannin Ste 2000 Houston, TX 77010 713-752-0017

==========

OSCAR ROBLES-CANON, officer with Atlas Global Group counter-defendant	Roger B Greenberg 713-752-0327 fax [COR LD NTC] Schwartz Junell et al 909 Fannin Ste 2000 Houston, TX 77010 713-752-0017

FRANCISCO LLAMOSA, officer with Atlas Global Group counter-defendant	Roger B Greenberg (See above) [COR LD NTC]

Appendix B

DATE	#	IMG	DOCKET ENTRY
11/18/97	1		COMPLAINT filed; FILING FEE $150 RECEIPT # 472861 (miw)
			* * *
6/17/98	9		MOTION with memorandum of law in support to dismiss, or in the alternative, to transfer venue by Grupo Dataflux, Motion Docket Date 7/7/98 [9-1] motion, 7/7/98 [9-2] motion , filed (lt) [Entry date 06/18/98]
			* * *
11/16/98	19		MEMORANDUM AND ORDER denying Grupo Dataflux's [9-1] motion to dismiss; denying [9-2] motion to transfer venue, entered. Parties notified. (signed by Judge Ewing Werlein Jr) (ym) [Entry date 11/18/98]
11/30/98	20		ORIGINAL ANSWER to Complaint and COUNTERCLAIM by Grupo Dataflux against Atlas Global Group, filed (lt)
12/9/98	21		MOTION for leave to add counterdefts by Dataflux SA de CV sued as Grupo Dataflux, Motion Docket Date 12/29/98 [21-1] motion, filed. (lt) [Entry date 12/10/98]
12/9/98	22		FIRST AMENDED COUNTERCLAIM by Dataflux SA de CV sued as Grupo Dataflux adding counterdefts Oscar Robles-Canon and Francisco Llamosa: amending [20-2] counterclaim, filed. (lt) [Entry date 12/10/98]
			* * *

Appendix B

12/16/98	23		ANSWER by Atlas Global Group LP to deft's [20-2] original counter claim, filed. (lt)
12/21/98	24		ANSWER by Atlas Global Group LP to [22-1] first amended counterclaim, filed. (lt) [Entry date 12/22/98]
			* * *
1/7/99	29		ORDER granting counterpltf's [21-1] motion for leave to add counterdefts, entered; counterpltf Grupo Dataflux shall proceed to serve counterdefts Francisco Llamosa and Oscar Robles-Canon with all due haste. Parties notified. (signed by Magistrate Judge Frances H. Stacy) (lt)
			* * *
2/1/99	30		MOTION to dismiss, or in the alternative for more definite statement by Francisco Llamosa, Motion Docket Date 2/21/99 [30-1] motion, 2/21/99 [30-2] motion, filed. (lt) [Entry date 02/02/99]
			* * *
2/22/99	31		RESPONSE by Dataflux SA de CV in opposition to Francisco Llamosa's [30-1] motion to dismiss or [30-2] motion for more definite statement , filed (lt)
			* * *

Appendix B

6/8/99 34 MEMORANDUM AND ORDER denying Llamosa's [30-1] motion to dismiss and his alternative motion to require Deft dataflux to replead is GRANTED; and if Deft Dataflux fails to file a Second Amended Counterclaim in the form of a more definite statement within fourteen (14) days after the date of entry of this Order, Llamosa may then reurge his Motion to Dismiss , entered. Parties notified. (signed by Judge Ewing Werlein Jr) (hl) [Entry date 06/09/99]

* * *

6/23/99 37 Second AMENDED COUNTERCLAIM by Grupo Dataflux: amending [22-1] amended claim, filed. (ps)

7/14/99 38 ANSWER by Francisco Llamosa to [37-1] second amended counterclaim, filed. (lt)

7/14/99 39 ANSWER by Atlas Global Group to [37-1] second amended counterclaim, filed. (lt)

* * *

10/14/99 42 ANSWER by Oscar Robles to [37-1] second amended counterclaim, filed. (lt) [Entry date 10/15/99]

* * *

Appendix B

11/15/99 44 MOTION for leave to file ast amd complt filed by Atlas Global Group. Motion Docket Date 12/5/99 [44-1] otion. (nd) [Entry date 11/16/99]

11/15/99 45 FIRST AMENDED COMPLAINT marked exhibit A to motion for leave to amend filed by Atlas Global Group amending [1-1] complaint. Answer due 11/25/99 for Grupo Dataflux. (nd) [Entry date 11/16/99]

11/17/99 46 ORDER granting [44-1] motion for leave to file 1st amd cmplt , entered; Parties notified. (signed by Judge Ewing Werlein Jr) (kh) [Entry date 11/18/99]

* * *

8/25/00 79 JOINT PRE-TRIAL ORDER by Atlas Global Group, Grupo Dataflux, Oscar Robles-Canon, Francisco Llamosa, filed (ks) [Entry date 08/28/00]

* * *

9/29/00 — Rec'd Consent to Proceed before a Magistrate, signed by parties, frwd to CRD (ps) [Entry date 10/02/00]

10/3/00 96 CONSENT to trial by Magistrate by Atlas Global Group, Grupo Dataflux and ORDER TRANSFERRING CASE (Signed by Judge Ewing Werlein, Jr) to Magistrate Judge Frances H. Stacy, entered. Parties ntfd. (ps) [Entry date 10/04/00]

* * *

Appendix B

10/19/00 106 MINUTES OF 1ST DAY JURY TRIAL held before Magistrate Judge Frances H Stacy on 10/19/00: Atty App(s): Greenberg, Hodges, Zeller, Waits, Lamosa/Co-Rep, f/Pltf, Robertson, Carpizo, Dreyer f/Defts, (Guillermo Salinas, President of Dataflux), Ct Rptr - Brent Laswell, Jury impaneled, Jury seated, Trial to begin on 10/23/00; Motions in Limine ruled on as stated on the record, filed (ks) [Entry date 10/27/00]

* * *

10/23/00 111 MINUTES OF 2ND DAY JURY TRIAL held before Magistrate Judge Stacy on 10/23/00: Atty App(s)/Ct Rptr same as previous day, Trial begins, Evidence presented, Pltfs calls Oscar Robles, filed (ks) [Entry date 10/27/00]

* * *

10/24/00 113 MINUTES OF 3RD DAY JURY TRIAL held before Magistrate Judge Frances H Stacy on 10/24/00: Atty(s)/Ct Rptr - same a previous day, Evidence presented, Pltf's witnesses called, filed (ks) [Entry date 10/27/00]

10/25/00 114 MINUTES OF 4TH DAY JURY TRIAL held before Magistrate Judge Frances H Stacy on 10/25/00: Atty App(s)/Ct Rptr - same as previous day, Evidence presented, Evidence concluded, Court's charge to the jury, Pltf's witnesses called, Pltf rest, Deft's motion for

Appendix B

judgment as a matter of law denied, Deft's witnesses called, Pltf motions for a directed verdict denied, Deft rest, Pltf recalls Oscar Robles, filed (ks) [Entry date 10/27/00]

10/26/00 115 MINUTES OF 5TH DAY JURY TRIAL held before Magistrate Judge Frances H Stacy on 10/26/00: Atty App(s)/Ct Rptr - same as previous day, Final Arguments heard, Jury deliberating, filed (ks) [Entry date 10/27/00]

* * *

10/27/00 117 MINUTES OF 6TH DAY JURY TRIAL held before Magistrate Judge Frances H Stacy on 10/27/00: Atty App(s)/Ct Rptr - same as previous day, Jury deliberating and Trial Ends, filed (ks)

10/27/00 118 COURT'S CHARGE TO THE JURY, filed (ks)

* * *

11/8/00 123 MOTION to dismiss for lack of jurisdiction by Grupo Dataflux, Motion Docket Date 10/28/00 [123-1] motion, filed. (hl) [Entry date 11/09/00] [Edit date 11/09/00]

11/8/00 124 MEMORANDUM by Grupo Dataflux in support of [123-1] motion to dismiss for lack of jurisdiction, filed (hl) [Entry date 11/09/00]

Appendix B

11/22/00 125 RESPONSE by Atlas Global Group to [123-1] motion to dismiss for lack of jurisdiction, filed. (hl) [Entry date 11/24/00]

11/27/00 126 REPLY by Deft Dataflux to Atlas' Response to Deft's [123-1] motion to dismiss for lack of subject matter jurisdiction, filed (ks) [Entry date 11/28/00]

11/28/00 127 SUR-REPLY by Pltf Atlas Global Group to Deft's [123-1] motion to dismiss for lack matter jurisdiction, filed (ks) [Entry date 11/29/00]

11/30/00 128 MOTION to enter judgment by Pltf Atlas Global Group, Francisco Llamosa and Oscar Robles-Canon, Motion Docket Date 12/20/00 [128-1] motion, filed. (ks) [Entry date 12/01/00]

12/6/00 129 MEMORANDUM AND ORDER that Deft's [123-1] motion to dismiss for lack of subject matter jurisdiction is GRANTED and this case is DISMISSED WITHOUT PREJUDICE; the statute of limitations for the claims alleged in this case is STAYED from 11/18/97, the date this case was filed, until ten days after the entry of this order, to allow Pltf to refile this case in the appropriate forum, entered. Parties notified. (signed by Magistrate Judge Frances H. Stacy) (ks)

Appendix B

12/6/00 — Case closed (ks)

12/15/00 130 MOTION to alter judgment, and to amend judgment by Pltf Atlas Global Group, Motion Docket Date 1/4/01 [130-1] motion, 1/4/01 [130-2] motion, filed. (ks) [Entry date 12/18/00]

12/18/00 131 SUPPLEMENT and Correction to [130-1] motion to alter judgment and [130-2] to amend judgment by Atlas Global Group, filed. (ks) [Entry date 12/19/00]

1/4/01 132 RESPONSE by Dataflux SA de CV to pltf's [130-1] motion to alter judgment or [130-2] motion to amend judgment, filed. (lt)

1/5/01 133 ORDER denying Pltf's [130-1] motion to alter judgment; denying Pltf's [130-2] motion to amend judgment, entered; Parties notified. (signed by Magistrate Judge Frances H. Stacy) (ym)

1/31/01 134 NOTICE to Correct Immaterial Fact by Pltf Atlas Global Group, filed (ks) [Entry date 02/01/01]

2/2/01 — Appeal Filing Fee Paid; FILING FEE $ 105.00 RECEIPT # 507286 (hl)

2/2/01 135 NOTICE OF APPEAL of [133-1] order, [129-1] order by Atlas Global Group, Oscar Robles-Canon, Francisco Llamosa, filed. Fee Status: Pd Receipt #: 507286 (bwd) [Entry date 02/27/01]

APPENDIX C — PLAINTIFF'S ORIGINAL COMPLAINT FILED NOVEMBER 18, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C.A. No. H 97 3779

ATLAS GLOBAL GROUP, L.P.,

Plaintiff,

v.

GRUPO DATAFLUX,

Defendant.

JURY TRIAL DEMANDED

PLAINTIFF'S ORIGINAL COMPLAINT

COMES NOW, Atlas Global Group, L.P., formerly known as Atlas Financial Group, L.P., Plaintiff in the above-captioned cause, and files this its Original Complaint against Defendant Grupo Dataflux and would respectfully show this Court as follows:

I. PARTIES

1. Plaintiff, Atlas Global Group, L.P., formerly known as Atlas Financial Group, L.P., is a limited partnership with its principal place of business located at 5847 San Felipe, Houston, Texas 77057.

2. Defendant Grupo Dataflux is a Mexican business with its principal place of business in Monterrey, Mexico. Grupo

Dataflux can be served with citation and Plaintiff's Original Complaint by serving its president, Mr. Guillermo Salinas Pliego, Dataflux, S.A. de C.V., Carretera Nacional Km 2.71, Col. La Estanzuela, Monterey, N.L. 64988.

II. JURISDICTION AND VENUE

3. Federal jurisdiction is proper based upon diversity jurisdiction pursuant to 28 U.S.C. § 1332(a), as this suit is between a Texas citizen and a citizen or subject of Mexico, and the matter in controversy exceeds, exclusive of interest and costs, the sum of Seventy-Five Thousand ($75,000.00) Dollars.

4. Venue is proper in this district pursuant to 28 U.S.C. § 1391 for the following reasons:

(a) A substantial part of the events or omissions giving rise to Plaintiff's claims occurred in this judicial district; and

(b) An alien can be sued in any district.

III. FACTUAL BACKGROUND

5. In 1996, Defendant Grupo Dataflux (hereinafter "Dataflux") was interested in financial expansion of its microcomputer wholesale distribution company based in Monterrey, Mexico. Dataflux believed it could increase its market share through the expansion of its warehouse facilities, upgrading its management information system, broadening its product mix, increasing its working capital,

and by advancing payments to its suppliers to acquire discounts. Dataflux, however, could not reach its goals alone: Dataflux needed a financial advisor to assist in the creation and implementation of a capital growth plan.

6. As part of its goal to implement its plan to expand, Dataflux sought the financial expertise of Plaintiff Atlas Global Group, L.P., formerly known as Atlas Financial Group, L.P., (hereinafter "Atlas"), a limited partnership based in Houston that specializes in financial advice and consultation and equity placement. In June 1996, Atlas and Dataflux initially met to discuss their possible teaming. After these initial meetings, Atlas's management was excited about helping Dataflux grow in the marketplace. Atlas's experienced team of investment professionals was prepared to introduce Dataflux to sophisticated international investors and to assist Dataflux in becoming a major financial player in the computer industry.

7. With Dataflux's needs and priorities in mind, Atlas prepared and proposed an approach for raising capital for Dataflux's growth. In exchange for becoming Atlas's exclusive financial advisor and securities placement agent, Atlas promised to (1) assist Dataflux in preparing required disclosure documents; (2) identify and contact selected qualified investors acceptable to Dataflux; (3) arrange for potential investors and conduct business investigations; and (4) negotiate the financial aspect of any proposed transaction under Dataflux's guidance. In exchange, Dataflux promised to use Atlas exclusively, in addition to promising to fairly compensate Atlas for financial guidance and for locating investors for the placement of its securities.

8. Relying upon Dataflux's representations of its devotion to their joint effort to facilitate the Dataflux's growth, Atlas entered into a written agreement with Dataflux on or about August 28, 1996. In their written agreement, Dataflux appointed Atlas as its **exclusive** financial advisor and securities placement agent, as follows:

> This letter agreement ("this Agreement") confirms our understanding that Grupo Dataflux (which, together with any subsidiaries and affiliates, is hereinafter referred to as the "Company") **has engaged Atlas Financial Group, L.P. to act as its exclusive financial advisor and securities placement agent** commencing upon the Company's acceptance of this Agreement, in connection with locating, evaluating and selecting potential investors located in the United States or elsewhere for the private placement of securities of the Company (a "Transaction").

(emphasis added).

The exclusive relationship between Atlas and Dataflux was clearly evidenced in their agreement:

> **Exclusivity.** In order to coordinate our efforts with respect to a possible placement or sale of securities satisfactory to the Company, **during the period of our engagement hereunder neither the Company nor any representative thereof (other than Atlas) will initiate discussions regarding a placement or sale of securities**

> **except through Atlas. In the event the Company or its management receives an inquiry regarding the placement or sale of securities from a third party, it will promptly advise Atlas of such inquiry** in order that Atlas may evaluate such prospective purchaser and its interest and assist the Company in any resulting negotiations.

In further recognition of the need for full and complete cooperation between the two parties in the effort to successfully place Dataflux's securities, Dataflux contractually agreed to fully cooperate and assist Atlas' endeavors:

> **Cooperation by the Company.** Atlas and the Company are committed to work together in order to consummate Transactions benefitting the Company. The Company agrees that it will use its reasonable best efforts to fully cooperate and assist Atlas in the process of seeking, evaluating, and completing Transactions.

9. Relying on Dataflux's good faith promise and contractual obligations regarding exclusivity and cooperation, Atlas devoted hundreds of hours of research to collect data for the creation of a private placement memorandum which would provide relevant financial and investment information to potential investors. On or about October 30, 1996, Atlas completed the private placement memorandum, which included a detailed discussion of Dataflux and its subsidiaries, the offering of its securities, the dividend policy, capitalization, Dataflux's financial condition, financial projections, investment considerations,

the company's facilities, business strategy, as well as other related information. When the private placement memorandum was completed, Atlas took Dataflux to the international capital market.

10. Throughout November and December 1996, and January 1997, Atlas worked diligently and aggressively to introduce Dataflux to potential investors. By January 28, 1997, Atlas had contacted more than 80 potential investors to promote Dataflux's private equity placement, including:

> Soros Group, Tiger Group, Harvard Management Company, Inc., Fenway Partners, Calpers, The Sprout Capital Group, Biltmore Emerging Markets, Lazard Emerging Markets, Govett Emerging Markets, Lexington Worldwide EM, T. Rowe Price EM Stock, Martin Currie, Strome Sussking Investment Management, L.P., First Reserve, HSBC Asset Management, Montgomery Asset Management, Salomon Brothers, Willis, Stein & Partners, Janus, Schooner Asset Management Co., WestSphere Capital Associates, Brandes Investment Partners, L.P., Bessemer Trust, KIO, Scottish Equitable, Banesto, Fenway Partners, Inc.; Mercury Asset Management; Hicks, Furst Muse & Tate; Legal & General; Murray Johnstone; Schroeders; ABN Amro; Bank Scandina; Gartmore; Edinburg Fund Managers; Citibank; Clariden; Hermes; Kleinworth Benson; NM Rothchild; Robert Fleming; Standard Life; Stewart Life; Stewart Ivory; Investment Bank of Ireland; State of Wisconsin Board of Investors;

Trust Company of the West/Latin America; Mercator; Interfunds, Inc.; Patricof & Co. Ventures, Inc.; Castile Capital Corp.; Bank of America; GT Capital Management; Fidelity Investments; Alliance Capital; IDS; Founders; Goldman Sachs; Nomura Capital Management; Merrill Lynch Asset Management; Kingdon Capital; Putnam Investments; Northern Trust; Northwestern Mutual; RCM Capital; Roney Capital Partners; Rothchild Emerging Markets; Scudder; Templeton; Tennenbaum & Co.; Strong Capital Management; Nicholas Applegate; Bank of New York; Texas Pacific Group (Newbridge Latin America); Darby Overseas Investments, Ltd.; Bastion Capital Corporation; Farallon Capital Management, Inc.; Electra Inc.; JP Morgan; Deltec Asset Management Corporation; Moore Capital; Morgan Stanley Asset Management; and Merrill Lynch Private Equity Group.

11. Throughout this period, Atlas continually provided financial advice and guidance to Dataflux. Atlas specifically provided Dataflux needed critical feedback Atlas had received from its numerous meetings and negotiations with potential investors in the marketplace regarding Dataflux's potential placement/sale of securities.

12. By the end of January 1997, three investors were seriously interested in Dataflux. By January 31, 1997, Dataflux rejected one of the potential investors. During January and February 1997, Atlas continued aggressive negotiations with potential investor DLJ regarding its interest

in Dataflux's securities. In February, DLJ visited Dataflux's office in Mexico. On or about February 28, 1997, Atlas communicated DLJ's proposal to Dataflux. To Atlas's surprise, Dataflux rejected this reasonable offer on or about March 3, 1997. On or about the same day, Dataflux notified Atlas that although Dataflux was enormously satisfied with Atlas's services, Dataflux was going to seek another alternative for placement of its securities.

13. In truth of fact, Dataflux had been surreptitiously negotiating with some third parties (*i.e.*, behind Atlas's back) for several months. Despite the existence of the exclusive agency agreement with Atlas, Dataflux did not inform or include Atlas in certain negotiations regarding the placement of Dataflux's securities as required by their agreement, which explicitly named Atlas as Dataflux's ***exclusive*** financial advisor and securities placement agent.

14. Notwithstanding Atlas's diligence, hard work or the existence of a fair and reasonable offer from a private investor, Dataflux had redirected its interests and desired to take the company public, instead of concentrating on and cooperating in the private placing its securities contrary to the advice of Atlas. Dataflux even encouraged Atlas to expend time and money to get an offer from DLJ, while simultaneously, Dataflux clandestinely focused on taking the company public with another investment bank.

15. Dataflux's "use them and lose them" way of doing business became more pronounced when Dataflux went public in Mexico by taking advantage of all of the work performed by Atlas during the last nine months. In July 1997,

the initial public offering of Dataflux stock was held. Dataflux used the private placement memorandum prepared by Atlas as a model for the disclosure document used in connection with Dataflux's public offering in Mexico without the knowledge, authority, or permission of Atlas.

16. Dataflux simply attempted to eliminate Atlas from the picture. Atlas, however, is **at a minimum** entitled to compensation from Dataflux pursuant to the Termination Clause of their agreement:

> If at any time prior to one year after the termination of this Agreement a Transaction is consummated with a party with whom or which Atlas communicated regarding a potential Transaction during the term of this Agreement, Atlas will be entitled to payment in full of the compensation described above. Promptly following any termination of this Agreement, Atlas will provide the Company with written notice of the parties with whom or which Atlas communicated regarding a Transaction during the period of our engagement.

In accordance with the Termination Clause, Atlas provided Dataflux with written notice of the parties with whom or which Atlas had communicated regarding the potential placement of Dataflux's securities:

> Abbey Life; ABN Amro; Advent International Corp.; Alliance Capital; Austin Ventures; BancBoston Capital, Inc.; Banco BBA Creditansatalt, S.A.;

> Banesto; Bank of America; Bank of New York; Bank Scandinave; Bankers Trust Co.; Bassini, Playfair & Associates, LLC; Bation Capital Corp.; BEA Associates; Bear, Stearns & Co.; Bechtel Enterprises, Inc., Benedetto, Gartland & Greene; Bessemer Trust; Biltmore Emerging Markets; Blackstone Group; Brandes Investment Partners, L.P.; Brinson Partners, Inc.; CALPERS; Casa de Bolsa Bancomer; Castile Capital Corp.; Chase Capital Partners (Mex-Capital); Citibank; Clariden; Clerical Medical; Credit Lyonnis Securities; Darby Overseas Investments, Ltd.; Deltec Asset Management, Corp.; Donaldson, Lufkin, Jenrette; Dunieden; DWS; Edinburgh Fund Managers; Elektra Fleming, Inc.; Farallon Capital Management, Inc.; Fenway Partners, Inc.; Fidelity Investments; First Madison Securities; First Reserve; First Union Capital Partners; Foreign & Colonial; Founders; G.E. Capital Corp./ Equity Capital Group; Gartmore; General Motors Pension Fund; Genesis; Global Emerging Markets of America; Goldman, Sachs & Co.; Govett Emerging Markets; GT Capital Management; Hambrecht & Quist; Harvard Management Company, Inc.; Hermes, Hicks, Muse, Tate & Furst, Inc.; HSBC Asset Management; IDS; Interfunds, Inc.; Investment Bank of Ireland; Ivory & Sime; Janus; JP Morgan Capital Corp.; Kingdon Capital; KIO; Kleinwort Benson; Latin America Enterprise Fund, L.P.; Lazard; Lazard Freres Asset Management; Legal & General; Lexington Worldwide EM; Liberty Mutual Insurance Co.;

Lombard Odier; Martin Currie; Mercator; Mercury Asset Management; Merrill Lynch & Co.; Merrill Lynch Asset Management; Merrill Lynch Private Equity Group; Montgomery Asset Management; Moore Capital; Morgan Grenfell; Morgan Stanley & Co.; Morgan Stanley Asset Management; Murray Johnstone; NM Rothchild; Nomura Capital Management; Northern Trust; Northwestern Mutual; Oppenheimer & Co.; Paine Webber, Inc.; Paribas; Patricof & Co. Ventures, Inc.; PIMCO Equity; Pioneer Emerging Markets; Prudential Securities; Putnam Investments; RCM Capital; Robeco; Robert Fleming; Roney Capital Partners; Rothchild EM; Rowe Price Fleming; Salomon Brothers; Santander Investment Securities; SBC; Schooner Asset Management; Schroeders; Scottish Equitable; Scottish Widows; Scudder, Stevens & Clark, Inc.; Select Capital; Smith Barney; Soros Group; Standard Life; State of Wisconsin Board of Investors; Stewart Ivory; Strome Susskind Investment Management, L.P., Strong Capital Management; T. Rowe Price; TCW/Latin American Partners, LLC; Teachers Insurance and Annuity; Templeton; Tennenbaum & Co.; Texas Pacific Group, Inc. (Newbridge Latin America); The Common Fund; The Sprout Captial Group; Threadneedle Investment Managers, Ltd.; Tiger Group; UBS; Vanguard; Westsphere Capital Associates; Wexford Management, L.P.; Willis, Stein & Partners; and Zemi Investments.

Because the initial public offering of Dataflux's stock occurred within one year after the termination of the Atlas/ Dataflux agreement and the transaction involved Santander Investment Securities, one of the companies listed by Atlas in the written notice, Dataflux owes Atlas payment in full of the 3.8 percent commission. In spite of Atlas's compliance with this provision, Dataflux has refused to compensate Atlas pursuant to the Termination Clause.

17. Additionally, Dataflux is required to compensate Atlas for its work pursuant to the Good Faith Negotiation Clause:

> **Good Faith Negotiation.** It is understood that if the Company completes a transaction in lieu of any Transaction for which Atlas is entitled to compensation pursuant to this Agreement (including, but not limited to, the sale, merger, consolidation or any other business combination, in one or a series of transactions, involving all or a substantial amount of the business, securities, or assets of the Company, a recapitalization, or a partial or complete liquidation), Atlas and the Company will in good faith mutually agree upon acceptable compensation for Atlas taking into account, among other things, the results obtained and the custom and practice of investment bankers acting in similar transactions.

See Exhibit A, at page 8.

Notwithstanding Atlas's attempts to contact Dataflux to

discuss a mutually agreeable compensation for Atlas, Dataflux has not responded.

18. Dataflux failed and refused to pay the compensation and expenses due, and continues to fail and refuse to pay the compensation and expenses due. Thus, Atlas has been forced to file this lawsuit in order to obtain the compensation to which it is rightfully entitled.

IV.

FIRST CLAIM FOR RELIEF

Breach of Contract

19. Atlas realleges and incorporates each and every allegation of paragraphs 1 through 18 herein.

20. Atlas performed its obligations under the agreement required to be performed on its part.

21. Dataflux breached the Cooperation by the Company clause through its failure to use its reasonable best efforts to fully cooperate and assist Atlas in the process of seeking, evaluating, and completing Transactions.

22. Dataflux breached the Exclusivity Clause of the agreement by initiating discussions regarding a placement or sale of securities without informing or involving Atlas and/or by failing to promptly advise Atlas of third-party dealings regarding the placement or sale of Dataflux's securities.

23. Dataflux breached the Cash Compensation Clause by failing to pay Atlas 3.8 percent of the consideration Dataflux received for its initial public offering.

24. Dataflux breached the Good Faith Negotiation Clause by failing to compensate Atlas under such clause.

25. As a direct and proximate result of the breaches of the agreement by Dataflux, as set forth above, Atlas has sustained damages in the amount of not less than $1,348,000 with pre-judgment interest thereon at the legal rate. In addition, Atlas is entitled to recover its reasonable attorneys' fees pursuant to Texas Civil Practice and Remedies Code §§38.001 *et. seq.*

SECOND CLAIM FOR RELIEF (ALTERNATIVE)

Quantum Meruit

26. Atlas realleges and incorporates each and every allegation of paragraphs 1 through 25 herein.

27. In the alternative, Atlas would show the Court that on the instance and at the request of Dataflux, Atlas provided financial services and advice and created a private placement memorandum for Dataflux. Dataflux accepted the benefit of services provided by Atlas, yet has refused to pay for such benefits. Atlas would show that an action in *quantum meruit* lies against said Defendant for the reasonable value of financial services in the amount of not less than $1,348,000.

Appendix C

WHEREFORE, ATLAS prays for judgment against Dataflux as follows:

1. On the first claim for relief (breach of contract), compensation, expenses, and costs due under the contract according to proof and in any event not less than $1,348,000;

2. On the second claim for relief (quantum meruit), compensation, expenses, and costs to fairly and adequately compensate Atlas for the services provided to Dataflux, and this amount should not be less than $1,348,000.

3. On each claim for relief, for general and special damages as proved at trial;

4. On all claims for relief, for prejudgment interest thereon, post judgment interest thereon, and all costs of suit;

5. For its reasonable attorneys fees as allowed by law; and

6. For such other and further relief as the Court may deem just and proper and any other relief to which it is entitled.

Appendix C

V.

JURY DEMAND

Plaintiff hereby requests a trial by jury on all issues.

Respectfully submitted,

By: _____
ROGER B. GREENBERG
State Bar No. 08390000
Attorney in Charge
GREENBERG, PEDEN,
SIEGMYER & OSHMAN, P.C.
12 Greenway Plaza, 10th Floor
Houston, TX 77046
(713) 627-2720
(713) 627-7057 FAX

OF COUNSEL:

ELIZABETH L. McDAVID
State Bar No. 00796710
GREENBERG, PEDEN,
SIEGMYER & OSHMAN, P.C.
12 Greenway Plaza, 10th Floor
Houston, TX 77046
(713) 627-2720
(713) 627-7057 FAX

ATTORNEYS FOR PLAINTIFF

APPENDIX D — DEFENDANT'S ORIGINAL ANSWER AND COUNTERCLAIM FILED NOVEMBER 30, 1998

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

C.A. NO. 97-3779

ATLAS GLOBAL GROUP, L.P.,

Plaintiff,

vs.

GRUPO DATAFLUX,

Defendant.

DEFENDANT'S ORIGINAL ANSWER AND COUNTERCLAIM

Defendant Dataflux S.A. de C.V., sued as "Grupo Dataflux," files this its answer and counterclaim to Plaintiff's Original Complaint.

1. With respect to paragraph 1 of the Complaint, defendant admits the allegations.

2. With respect to paragraph 2 of the Complaint, defendant admits that it was sued as "Grupo Dataflux," but denies the name is correct since its name is Dataflux S.A. de C.V.

3. With respect to paragraph 3 of the Complaint, defendant admits that plaintiff claims the controversy exceeds Seventy-Five Thousand Dollars (although defendant denies it owes plaintiff anything) and admits that the federal court has subject matter jurisdiction.

4. With respect to paragraph 4 of the Complaint, defendant denies the allegations.

5. With respect to paragraph 5 of the Complaint, defendant admits the allegations.

6. With respect to paragraph 6 of the Complaint, defendant admits that plaintiff held itself out to be a specialist in financial advice, consultation and equity placement, but denies that plaintiff was such a specialist. Defendant admits that plaintiff claimed that it was experienced, would introduce defendant to sophisticated international investors, and would assist defendant into becoming a major financial player, but defendant denies that plaintiff was any of those things or could do any of those things.

7. With respect to paragraph 7 of the Complaint, defendant admits the allegations contained in the first sentence, but denies the remainder of the allegations in paragraph 7.

8. With respect to paragraph 8 of the Complaint, defendant admits that it entered into an agreement with Dataflux but denies that the agreement can be interpreted except by reference to the entire agreement (although it admits that portions of the agreement are quoted) and denies the other allegations in the paragraph.

Appendix D

9. With respect to paragraph 9 of the Complaint, defendant does not have enough information to admit or deny the facts contained in the first sentence. Defendant admits the facts contained in the second sentence. With respect to the third sentence, defendant admits that the private placement memorandum was shared with a few potential investors, but otherwise denies the allegations.

10. With respect to paragraph 10 of the Complaint, defendant denies that Atlas worked diligently and aggressively and denies that those entities listed were potential investors. Defendant does not have enough information to admit or deny how many or what persons or entities plaintiff may have contacted and so it denies the allegations.

11. With respect to paragraph 11 of the Complaint, defendant denies the allegations.

12. With respect to paragraph 12 of the Complaint, defendant denies the allegations contained in the first, second and third sentences. Defendant never rejected any investor although it rejected one or more verbal offers that were not reasonable and not adequate. Defendant admits the allegations contained in the fourth and fifth sentences although defendant denies that any proposal from DLJ was made to defendant in writing. With respect to the allegations contained in the sixth sentence, defendant denies that the offer was reasonable. With respect to the seventh sentence, defendant denies that defendant was enormously satisfied with plaintiff's services.

Appendix D

13. With respect to paragraph 13 of the Complaint, defendant denies the allegations.

14. With respect to paragraph 14 of the Complaint, defendant admits that it made a public offering, but denies the remaining allegations.

15. With respect to paragraph 15 of the Complaint, defendant denies the allegations.

16. With respect to paragraph 16 of the Complaint, defendant admits that a portion of the agreement between the parties is quoted but denies the remainder of the allegations.

17. With respect to paragraph 17 of the Complaint, defendant admits that a portion of the agreement between the parties is quoted but denies the remainder of the allegations.

18. With respect to paragraph 18 of the Complaint, defendant denies the allegations.

19. With respect to paragraph 19 of the Complaint, no response is necessary.

20. With respect to paragraph 20 of the Complaint, defendant denies the allegations.

21. With respect to paragraph 21 of the Complaint, defendant denies the allegations.

Appendix D

22. With respect to paragraph 22 of the Complaint, defendant denies the allegations.

23. With respect to paragraph 23 of the Complaint, defendant denies the allegations.

24. With respect to paragraph 24 of the Complaint, defendant denies the allegations.

25. With respect to paragraph 25 of the Complaint, defendant denies the allegations.

26. With respect to paragraph 26 of the Complaint, no response is necessary.

27. With respect to paragraph 27 of the Complaint, defendant denies the allegations.

PLAINTIFF'S PRAYER

Defendant denies all the allegations contained in the six paragraphs of plaintiff's prayer.

DEFENSES

1. Plaintiff failed to provide the services that it claimed it would and could provide.

2. Plaintiff misled defendant by expressing a value that plaintiff would obtain for defendant's stock and then failing to obtain that value.

Appendix D

3. Defendant has not hired anyone other than plaintiff to conduct a private placement so the contract does not require defendant to pay plaintiff.

COUNTERCLAIM

Defendant brings this its counterclaim against plaintiff to recover its losses caused by plaintiff's fraudulent misrepresentations.

1. Prior to the time when the parties entered into their agreement, plaintiff-counterdefendant misled defendant-counterplaintiff by intentionally claiming that Atlas had contacts and expertise that would enable it to accomplish a successful private placement even though Atlas knew that it did not have the contacts and expertise to enable it to accomplish a successful private placement in the manner it claimed it could and would. As a result of those misrepresentations, Dataflux decided to hire Atlas to help it conduct a private placement. Atlas claimed that it would be able to conduct the private placement in a manner that would raise a certain amount of capita'. Atlas failed to accomplish such a private placement and failed to obtain the type of investment that it represented it would be able to obtain.

2. Because Dataflux hired Atlas as a result of the misrepresentations, Dataflux spent time and energy trying to achieve a private placement that in hindsight it realizes Atlas did not have the ability or connections to accomplish. Dataflux lost the value of having the capital it needed during the delay caused by Atlas' misrepresentations. Further, Dataflux employees spent time and money in working with

Atlas as a result of Atlas' misrepresentations. Because Atlas' fraudulent misrepresentations caused injury to Dataflux, Dataflux files this counterclaim to obtain its losses.

3. Dataflux also seeks punitive damages for the fraud committed by Atlas.

PRAYER

1. Defendant prays that plaintiff take nothing and that this Court grant all other relief defendant is entitled to receive.

2. Defendant seeks compensation for the damages caused by Atlas' fraudulent misrepresentations.

3. Defendant seeks punitive damages for Atlas' fraudulent misrepresentations.

Respectfully submitted,

Mark A. Robertson
State Bar No. 17066720
1301 McKinney, Suite 5100
Houston, Texas 77010-3095
Telephone: 713/651-5151
Telecopier: 713/651-5249
Attorney-In-Charge For Defendant
Dataflux S.A. de C.V.,
sued as Grupo Dataflux

OF COUNSEL:
William R. Pakalka
State Bar No. 15420800
Fulbright & Jaworski L.L.P.
1301 McKinney, Suite 5100
Houston, Texas 77910-3095
Telephone: 713/651-5151
Telecopier: 713/651-5246

APPENDIX E — DEFENDANT'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION FILED NOVEMBER 8, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C.A. NO. 97-3779

ATLAS GLOBAL GROUP, L.P.,

Plaintiff and Counterdefendant,

vs.

GRUPO DATAFLUX,

Defendant and Counterplaintiff.

DEFENDANT'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

Pursuant to Fed. R. Civ. P. 12(b)(1) and 12(h)(3), Defendant, Dataflux S.A. de C.V. ("Dataflux") files this Motion to Dismiss for lack of subject matter jurisdiction. As is more fully described in the memorandum in support and the exhibits attached to that memorandum, dismissal is required in this case as a matter of law because subject matter jurisdiction does not exist.

1. Subject matter jurisdiction in this case is premised upon diversity of citizenship under 28 U.S.C. § 1332. No federal claims have been asserted. In order for subject

matter jurisdiction to exist in a diversity case, the citizenship of all the plaintiffs must be different from the citizenship of all the defendants.

2. In this case, complete diversity is lacking. When a limited partnership plaintiff asserts diversity jurisdiction, the citizenship of all the partners – limited partners as well as general partners – is analyzed to determine whether diversity exists. Defendant Dataflux is a Mexican corporation that was sued by Atlas, a limited partnership that has two alien limited partners – Oscar Robles Canon (a citizen of Mexico) and Heptagon Investments (a British Virgin Islands company). Because complete diversity is lacking, this Court does not have subject matter jurisdiction and the lawsuit must be dismissed. Fed. R. Civ. P. 12(h)(3).

For these reasons, and for the reasons more fully set forth in the attached memorandum and exhibits in support, Dataflux requests that this Court grant Defendant's motion to dismiss the lawsuit for lack of subject matter jurisdiction. Defendant further requests all other general and equitable relief to which it may be entitled.

Respectfully submitted,

Mark A. Robertson
State Bar No.
1301 McKinney, Suite 5100
Houston, Texas 77010-3095
Telephone: (713) 651-5151
Telecopier: (713) 651-5246

Attorney-in-Charge for
Dataflux S.A. de C.V.

Appendix E

OF COUNSEL:

Kirk D. Dreyer
State Bar No. 24004624
FULBRIGHT & JAWORSKI L.L.P.
1301 McKinney, Suite 5100
Houston, Texas 77010-3095
Telephone: (713) 651-5151
Telecopier: (713) 651-5246

APPENDIX F — MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION FILED NOVEMBER 8, 2000

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

C.A. NO. 97-3779

ATLAS GLOBAL GROUP, L.P.,

Plaintiff and Counterdefendant,

vs.

GRUPO DATAFLUX,

Defendant and Counterplaintiff.

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

Defendant Dataflux S.A. de C.V. ("Dataflux") submits this memorandum in support of its motion to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(h)(3).

I. Diversity Jurisdiction Requires An Examination Of The Limited Partners' Citizenship.

Subject matter jurisdiction in this case is premised upon diversity of citizenship under 28 U.S.C. § 1332. Plaintiff's

Appendix F

First Amended Complaint at 1-2, Ex. A. No claims under federal law have been made. *Id.* When an assertion of subject matter jurisdiction based upon diversity is made by a plaintiff that is a limited partnership, the citizenship of all the partners – limited partners as well as general partners – determines the citizenship of the partnership itself. *Carden v. Arkoma Associates*, 494 U.S. 185, 195 (1990). "[D]iversity jurisdiction in *any* suit 'by or against' a limited partnership depends on the citizenship of *all* its partners." *Whalen v. Carter*, 954 F.2d 1087, 1095 (5th Cir. 1992) (emphasis original). Here, the partners of Atlas Global Group, L.P. ("Atlas") include an individual who is a citizen of Mexico and a corporate entity which is a citizen of the British Virgin Islands. *See infra* section II. Defendant Dataflux is a Mexican Corporation. October 30, 1996 Private Placement Memorandum (Atlas' trial exhibit no. 2) at 1, relevant portion attached as Ex. B. Accordingly, complete diversity is lacking and jurisdiction is improper in this Court.

II. This Court Lacks Subject Matter Jurisdiction Because Two Limited Partners In The Plaintiff Are Aliens And The Defendant Is An Alien.

Atlas has three limited partners: Oscar Robles, Francisco Llamosa and Heptagon Investments. *See* Robles dep. at 6, Ex. C. Mr. Robles is a citizen of Mexico. *See id.* at 13, Ex. C.[1] In addition, Heptagon Investments is an "offshore

1. Mr. Robles testified at trial to living in Monterrey, Mexico and being a recipient of a Fulbright Scholar fellowship, which is a fellowship given by the Congress of the United States to citizens of foreign countries for study within the United States. Roger Greenberg asserted at trial that Mr. Robles is a citizen of Mexico.

Appendix F

group." Marziale dep. at 9, Ex. D. At trial, Mr. Marziale testified that Heptagon Investments was incorporated in the British Virgin Islands. As explained in *Carden*, the citizenship of Mr. Robles and Heptagon Investments must be considered in determining the citizenship of Atlas. *Carden*, 494 U.S. at 195. Because Atlas has two limited partners who are aliens and because Dataflux is an alien, diversity jurisdiction does not exist. *See, e.g, Franceskin v. Credit Suisse*, 214 F.3d 253, 257 (2d Cir. 2000) (court of appeal vacated judgment *sua sponte* because no diversity jurisdiction existed between an Argentinian plaintiff and Swiss defendant "because federal courts lack subject matter jurisdiction over state law claims among aliens"); *Giannakos*, 762 F.2d at 1298 ("Diversity does not exist where aliens are on both sides of the litigation"). Without complete diversity, jurisdiction is improper in this Court. *E.g. American Fire & Cas. Co. v. Finn*, 341 U.S. 6, 17-18 (1951) (vacating judgment because no diversity jurisdiction existed even though defendant who lost the trial and who had removed the case to federal court did not challenge the court's jurisdiction until after trial); *Stafford v. Mobil Oil Corp.*, 945 F.2d 803, 804 (5th Cir. 1991) ("[I]n order for a federal court to assert diversity jurisdiction, diversity must be complete; the citizenship of all of the plaintiffs must be different from the citizenship of all of the defendants.").

"'[B]ecause the establishment of a basis for the exercise of subject matter jurisdiction is the *sine qua non* of federal litigation,' the Fifth Circuit has 'consistently held that it is the party who urges jurisdiction upon the Court who must always bear the burden of demonstrating that the case is one which is properly before the federal tribunal.'" *Riebe v.*

National Loan Investors, L.P., 828 F. Supp. 453, 455 (N.D. Tex. 1993) (*quoting B. v. Miller Brewing Co.*, 663 F.2d 545, 549 (5th Cir. 1981)); *see also Stafford*, 945 F.2d at 804 (5th Cir. 1991) ("The burden of proving that complete diversity exists rests upon the party who seeks to invoke the court's diversity jurisdiction."). Atlas has not demonstrated that diversity jurisdiction exists in this case despite its burden to do so.

III. The Motion To Dismiss Is Timely.

Federal Rule of Civil Procedure 12(h)(3) requires that "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court *shall dismiss the action*." Fed. R. Civ. P. 12(h)(3) (emphasis added). "The question of subject matter jurisdiction can never be waived. Nor can jurisdiction be conferred by conduct or consent of the parties." *Giannakos v. M/V Bravo Trader*, 762 F.2d 1295, 1297 (5th Cir. 1985). *See also Santos v. Alaska Bar Ass'n.*, 618 F.2d 575, 577 (9th Cir. 1980) (raising jurisdictional challenge for the first time on appeal). Subject matter jurisdiction can be raised by a party who invokes federal court jurisdiction after the party loses a trial on the merits. *American Fire*, 341 U.S. at 17-18 (vacating judgment because no diversity existed even though the defendant who removed the case to federal court did not file a motion complaining of jurisdiction until after the jury's verdict); *Attorneys Trust v. Videotape Computer Products, Inc.*, 93 F.3d 593, 594-595 (9th Cir. 1996) (vacating judgment against a "disappointed plaintiff" who raised the objection to jurisdiction after verdict because a plaintiff may "raise jurisdictional challenges at any time during the proceedings"). Accordingly, this motion is timely and should be granted.

CONCLUSION

For the foregoing reasons, defendant Dataflux S.A. de C.V. requests that this lawsuit be dismissed in its entirety pursuant to Fed. R. Civ. P. 12(h)(3). Dataflux S.A. de C.V. further requests all additional relief to which it may be entitled.

Respectfully submitted,

Mark A. Robertson
State Bar No. 17066720
1301 McKinney, Suite 5100
Houston, Texas 77010-3095
Telephone: (713) 651-5151
Telecopier: (713) 651-5246
Attorney-in-Charge for
Dataflux S.A. de C.V.

OF COUNSEL:

Kirk D. Dreyer
State Bar No. 24004624
FULBRIGHT & JAWORSKI L.L.P.
1301 McKinney, Suite 5100
Houston, Texas 77010-3095
Telephone: (713) 651-5151
Telecopier: (713) 651-5246

Appendix F

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C.A. NO. H-97-3779

JURY TRIAL DEMANDED

ATLAS GLOBAL GROUP, L.P.,

Plaintiff

vs.

GRUPO DATAFLUX,

Defendant

PLAINTIFF'S FIRST AMENDED ORIGINAL COMPLAINT

COMES NOW, Atlas Global Group, L.P., formerly known as Atlas Financial Group, L.P., Plaintiff in the above-captioned cause, and files this its First Amended Original Complaint and would respectfully show this Court as follows:

I. PARTIES

1. Plaintiff, Atlas Global Group, L.P., formerly known as Atlas Financial Group, L.P., is a limited partnership with its principal place of business located at 5847 San Felipe, Houston, Texas 77057.

Appendix F

2. Defendant Dataflux S.A. de C.V. is a Mexican business with its principal place of business in Monterrey, Mexico. Dataflux S.A. de C.V. has appeared in this lawsuit and this First Amended Original Complaint can be served on its attorney of record Mark A. Robertson, Fulbright & Jaworski, 1301 McKinney, Suite 5100, Houston, Texas 77010-3095.

II. JURISDICTION AND VENUE

3. Federal jurisdiction is proper based upon diversity jurisdiction pursuant to 28 U.S.C. § 1332(a), as this suit is between a Texas citizen and a citizen or subject of Mexico, and the matter in controversy exceeds, exclusive of interest and costs, the sum of Seventy-Five Thousand ($75,000.00) Dollars.

4. Venue is proper in this district pursuant to 28 U.S.C. § 1391 for the following reasons:

(a) A substantial part of the events or omissions giving rise to Plaintiff's claims occurred in this judicial district; and

(b) An alien can be sued in any district.

III. FACTUAL BACKGROUND

5. In 1996, Defendant Dataflux S.A. de C.V. (hereinafter "Dataflux") was interested in financial expansion of its microcomputer wholesale distribution company based in Monterrey, Mexico. Dataflux believed its could increase its

market share through the expansion of its warehouse facilities, upgrading its management information system, broadening its product mix, increasing its working capital, and by advancing payments to its suppliers to acquire discounts. Dataflux, however, could not reach its goals alone: Dataflux needed a financial advisor to assist in the creation and implementation of a capital growth plan.

6. As part of its goal to implement its plan to expand, Dataflux sought the financial expertise of Plaintiff Atlas Global Group, L.P., formerly known as Atlas Financial Group, L.P., (hereinafter "Atlas"), a limited partnership based in Houston that specializes in financial advice and consultation and equity placement. In June 1996, Atlas and Dataflux initially met to discuss their possible teaming. After these initial meetings, Atlas's management was excited about helping Dataflux grow in the marketplace. Atlas's experienced team of investment professionals was prepared to introduce Dataflux to sophisticated international investors and to assist Dataflux in becoming a major financial player in the computer industry.

7. With Dataflux's needs and priorities in mind, Atlas prepared and proposed an approach for raising capital for Dataflux's growth. In exchange for becoming Atlas's exclusive financial advisor and securities placement agent, Atlas promised to (1) assist Dataflux in preparing required disclosure documents; (2) identify and contact selected qualified investors acceptable to Dataflux; (3) arrange for potential investors and conduct business investigations; and (4) negotiate the financial aspect of any proposed transaction under Dataflux's guidance. In exchange, Dataflux

promised to use Atlas exclusively, in addition to promising to fairly compensate Atlas for financial guidance and for locating investors for the placement of its securities.

8. Relying upon Dataflux's representations of its devotion to their joint effort to facilitate the Dataflux's growth, Atlas entered into a written agreement with Dataflux on or about August 28, 1996. In their written agreement, Dataflux appointed Atlas as its exclusive financial advisor and securities placement agent, as follows:

> This letter agreement ("this Agreement") confirms our understanding that Grupo Dataflux (which, together with any subsidiaries and affiliates, is hereinafter referred to as the "Company") has engaged Atlas Financial Group, L.P. to act as its exclusive financial advisor and securities placement agent commencing upon the Company's acceptance of this Agreement, in connection with locating, evaluating and selecting potential investors located in the United States or elsewhere for the private placement of securities of the Company (a "Transaction").

(emphasis added).

The exclusive relationship between Atlas and Dataflux was clearly evidenced in their agreement:

> Exclusivity. In order to coordinate our efforts with respect to a possible placement or sale of securities satisfactory to the Company, during the period of

> our engagement hereunder neither the Company nor any representative thereof (other than Atlas) will initiate discussions regarding a placement or sale of securities except through Atlas. In the event the Company or its management receives an inquiry regarding the placement or sale of securities from a third party, it will promptly advise Atlas of such inquiry in order that Atlas may evaluate such prospective purchaser and its interest and assist the Company in any resulting negotiations.

Such exclusivity was not limited to a private placement, but rather any inquiry related to the placement or sale of securities from a third party.

9. In further recognition of the need for full and complete cooperation between the two parties in the effort to successfully place Dataflux's securities, Dataflux contractually agreed to fully cooperate and assist Atlas' endeavors:

> Cooperation by the Company. Atlas and the Company are committed to work together in order to consummate Transactions benefitting the Company. The Company agrees that it will use its reasonable best efforts to fully cooperate and assist Atlas in the process of seeking, evaluating, and completing Transactions.

10. Relying on Dataflux's good faith promise and contractual obligations regarding exclusivity and cooperation,

Atlas devoted hundreds of hours of research to collect data for the creation of a private placement memorandum which would provide relevant financial and investment information to potential investors. On or about October 30, 1996, Atlas completed the private placement memorandum, which included a detailed discussion of Dataflux and its subsidiaries, the offering of its securities, the dividend policy, capitalization, Dataflux's financial condition, financial projections, investment considerations, the company's facilities, business strategy, as well as other related information. When the private placement memorandum was completed, Atlas took Dataflux to the international capital market.

11. Throughout November and December 1996, and January 1997, Atlas worked diligently and aggressively to introduce Dataflux to potential investors. By January 28, 1997, Atlas had contacted more than 80 potential investors to promote Dataflux's private equity placement, including:

> Soros Group, Tiger Group, Harvard Management Company, Inc., Fenway Partners, Calpers, The Sprout Capital Group, Biltmore Emerging Markets, Lazard Emerging Markets, Govett Emerging Markets, Lexington Worldwide EM, T. Rowe Price EM Stock, Martin Currie, Strome Sussking Investment Management, L.P., First Reserve, HSBC Asset Management, Montgomery Asset Management, Salomon Brothers, Willis, Stein & Partners, Janus, Schooner Asset Management Co., WestSphere Capital Associates, Brandes Investment Partners,

L.P., Bessemer Trust, KIO, Scottish Equitable, Banesto, Fenway Partners, Inc.; Mercury Asset Management; Hicks, Furst Muse & Tate; Legal & General; Murray Johnstone; Schroeders; ABN Amro; Bank Scandina; Gartmore; Edinburg Fund Managers; Citibank; Clariden; Hermes; Kleinworth Benson; NM Rothchild; Robert Fleming; Standard Life; Stewart Life; Stewart Ivory; Investment Bank of Ireland; State of Wisconsin Board of Investors; Trust Company of the West/Latin America; Mercator; Interfunds, Inc.; Patricof & Co. Ventures, Inc.; Castile Capital Corp.; Bank of America; GT Capital Management; Fidelity Investments; Alliance Capital; IDS; Founders; Goldman Sachs; Nomura Capital Management; Merrill Lynch Asset Management; Kingdon Capital; Putnam Investments; Northern Trust; Northwestern Mutual; RCM Capital; Roney Capital Partners; Rothchild Emerging Markets; Scudder; Templeton; Tennenbaum & Co.; Strong Capital Management; Nicholas Applegate; Bank of New York; Texas Pacific Group (Newbridge Latin America); Darby Overseas Investments, Ltd.; Bastion Capital Corporation; Farallon Capital Management, Inc.; Electra Inc.; JP Morgan; Deltec Asset Management Corporation; Moore Capital; Morgan Stanley Asset Management; and Merrill Lynch Private Equity Group.

12. Throughout this period, Atlas continually provided financial advice and guidance to Dataflux. Atlas specifically

provided Dataflux needed critical feedback Atlas had received from its numerous meetings and negotiations with potential investors in the marketplace regarding Dataflux's potential placement/sale of securities.

13. By the end of January 1997, three investors were seriously interested in Dataflux. By January 31, 1997, Dataflux rejected one of the potential investors. During January and February 1997, Atlas continued aggressive negotiations with potential investor DLJ regarding its interest in Dataflux's securities. In February, DLJ visited Dataflux's office in Mexico. On or about February 28, 1997, Atlas communicated DLJ's proposal to Dataflux. To Atlas's surprise, Dataflux rejected this reasonable offer on or about March 3, 1997. On or about the same day, Dataflux notified Atlas that although Dataflux was enormously satisfied with Atlas's services, Dataflux was going to seek another alternative for placement of its securities.

14. In truth of fact, Dataflux had been surreptitiously negotiating with some third parties (*i.e.*, behind Atlas's back) for several months. Despite the existence of the exclusive agency agreement with Atlas, Dataflux did not inform or include Atlas in certain negotiations regarding the placement of Dataflux's securities as required by their agreement, which explicitly named Atlas as Dataflux's *exclusive* financial advisor and securities placement agent. Dataflux did not cooperate and assist Atlas in the process of seeking, evaluating, and completing a placement of Dataflux's securities.

15. Notwithstanding Atlas's diligence, hard work or the existence of a fair and reasonable offer from a private investor, Dataflux had redirected its interests and desired to take the company public, instead of concentrating on and cooperating in the private placing its securities contrary to the advice of Atlas. Dataflux even encouraged Atlas to expend time and money to get an offer from DLJ, while simultaneously, Dataflux clandestinely focused on taking the company public with another investment bank.

16. Dataflux's "use them and lose them" way of doing business became more pronounced when Dataflux went public in Mexico by taking advantage of all of the work performed by Atlas during the last nine months. In July 1997, the initial public offering of Dataflux stock was held. Dataflux used the private placement memorandum prepared by Atlas as a model for the disclosure document used in connection with Dataflux's public offering in Mexico without the knowledge, authority, or permission or Atlas.

17. Dataflux simply attempted to eliminate Atlas from the picture. Atlas, however, is at a minimum entitled to compensation from Dataflux pursuant to the Termination Clause of their agreement:

> If at any time prior to one year after the termination of this Agreement a Transaction is consummated with a party with whom or which Atlas communicated regarding a potential Transaction during the term of this Agreement, Atlas will be entitled to payment in full of the compensation described above. Promptly

> following any termination of this Agreement, Atlas will provide the Company with written notice of the parties with whom or which Atlas communicated regarding a Transaction during the period of our engagement.

In accordance with the Termination Clause, Atlas provided Dataflux with written notice of the parties with whom or which Atlas had communicated regarding the potential placement of Dataflux's securities:

> Abbey Life; ABN Amro; Advent International Corp.; Alliance Capital; Austin Ventures; BancBoston Capital, Inc.; Banco BBA Creditansatalt, S.A.; Banesto; Bank of America; Bank of New York; Bank Scandinave; Bankers Trust Co.; Bassini, Playfair & Associates, LLC; Bation Capital Corp.; BEA Associates; Bear, Stearns & Co.; Bechtel Enterprises, Inc., Benedetto, Gartland & Greene; Bessemer Trust; Biltmore Emerging Markets; Blackstone Group; Brandes Investment Partners, L.P.; Brinson Partners, Inc.; CALPERS; Casa de Bolsa Bancomer; Castile Capital Corp.; Chase Capital Partners (Mex-Capital); Citibank; Clariden; Clerical Medical; Credit Lyonnis Securities; Darby Overseas Investments, Ltd.; Deltec Asset Management, Corp.; Donaldson, Lufkin, Jenrette; Dunieden; DWS; Edinburgh Fund Managers; Elektra Fleming, Inc.; Farallon Capital Management, Inc.; Fenway Partners, Inc.; Fidelity Investments; First Madison Securities; First

Reserve; First Union Capital Partners; Foreign & Colonial; Founders; G.E. Capital Corp./Equity Capital Group; Gartmore; General Motors Pension Fund; Genesis; Global Emerging Markets of America; Goldman, Sachs & Co.; Govett Emerging Markets; GT Capital Management; Hambrecht & Quist; Harvard Management Company, Inc.; Hermes; Hicks, Muse, Tate & Furst, Inc.; HSBC Asset Management; IDS; Interfunds, Inc.; Investment Bank of Ireland; Ivory & Sime; Janus; JP Morgan Capital Corp.; Kingdon Capital; KIO; Kleinwort Benson; Latin America Enterprise Fund, L.P.; Lazard; Lazard Freres Asset Management; Legal & General; Lexington Worldwide EM; Liberty Mutual Insurance Co.; Lombard Odier; Martin Currie; Mercator; Mercury Asset Management; Merrill Lynch & Co.; Merrill Lynch Asset Management; Merrill Lynch Private Equity Group; Montgomery Asset Management; Moore Capital; Morgan Grenfell; Morgan Stanley & Co.; Morgan Stanley Asset Management; Murray Johnstone; NM Rothchild; Nomura Capital Management; Northern Trust; Northwestern Mutual; Oppenheimer & Co.; Paine Webber, Inc.; Paribas; Patricof & Co. Ventures, Inc.; PIMCO Equity; Pioneer Emerging Markets; Prudential Securities; Putnam Investments; RCM Capital; Robeco; Robert Fleming; Roney Capital Partners; Rothchild EM; Rowe Price Fleming; Salomon Brothers; Santander Investment Securities; SBC; Schooner Asset Management; Schroeders; Scottish Equitable; Scottish Widows;

Scudder, Stevens & Clark, Inc.; Select Capital; Smith Barney; Soros Group; Standard Life; State of Wisconsin Board of Investors; Stewart Ivory; Strome Susskind Investment Management, L.P., Strong Capital Management; T. Rowe Price; TCW/Latin American Partners, LLC; Teachers Insurance and Annuity; Templeton; Tennenbaum & Co.; Texas Pacific Group, Inc. (Newbridge Latin America); The Common Fund; The Sprout Captial Group; Threadneedle Investment Managers, Ltd.; Tiger Group; UBS; Vanguard; Westsphere Capital Associates; Wexford Management, L.P.; Willis, Stein & Partners; and Zemi Investments.

Because the initial public offering of Dataflux's stock occurred within one year after the termination of the Atlas/ Dataflux agreement and the transaction involved Santander Investment Securities, one of the companies listed by Atlas in the written notice, Dataflux owes Atlas payment in full of the 3.8 percent commission. In spite of Atlas's compliance with this provision, Dataflux has refused to compensate Atlas pursuant to the Termination Clause.

18. Additionally, Dataflux is required to compensate Atlas for its work pursuant to the Good Faith Negotiation Clause:

> **Good Faith Negotiation.** It is understood that if the Company completes a transaction in lieu of any Transaction for which Atlas is entitled to compensation pursuant to this Agreement

(including, but not limited to, the sale, merger, consolidation or any other business combination, in one or a series of transactions, involving all or a substantial amount of the business, securities, or assets of the Company, a recapitalization, or a partial or complete liquidation), Atlas and the Company will in good faith mutually agree upon acceptable compensation for Atlas taking into account, among other things, the results obtained and the custom and practice of investment bankers acting in similar transactions.

See Exhibit A, at page 8.

Notwithstanding Atlas's attempts to contact Dataflux to discuss a mutually agreeable compensation for Atlas, Dataflux has not responded.

19. Dataflux failed and refused to pay the compensation and expenses due, and continues to fail and refuse to pay the compensation and expenses due under the agreement. Thus, Atlas has been forced to file this lawsuit in order to obtain the compensation to which it is rightfully entitled.

IV.

FIRST CLAIM FOR RELIEF

Breach of Contract

20. Atlas realleges and incorporates each and every allegation of paragraphs 1 through 18 herein.

21. Atlas performed its obligations under the agreement required to be performed on its part.

22. Dataflux breached the Cooperation by the Company clause through its failure to use its reasonable best efforts to fully cooperate and assist Atlas in the process of seeking, evaluating, and completing Transactions.

23. Dataflux breached the Exclusivity Clause of the agreement by initiating discussions regarding a placement or sale of securities without informing or involving Atlas and/or by failing to promptly advise Atlas of third-party dealings regarding the placement or sale of Dataflux's securities.

24. Dataflux breached the Cash Compensation Clause by failing to pay Atlas 3.8 percent of the consideration Dataflux received for its initial public offering.

25. Dataflux breached the Good Faith Negotiation Clause by failing to compensate Atlas under such clause.

26. As a direct and proximate result of the breaches of the agreement by Dataflux, as set forth above, Atlas has sustained damages in the amount of not less than $1,348,000 with prejudgment interest thereon at the legal rate. In addition, Atlas is entitled to recover its reasonable attorneys' fees pursuant to Texas Civil Practice and Remedies Code §§38.001 *et. seq.*

SECOND CLAIM FOR RELIEF (ALTERNATIVE)

Quantum Meruit

27. Atlas realleges and incorporates each and every allegation of paragraphs 1 through 25 herein.

28. In the alternative, Atlas would show the Court that on the instance and at the request of Dataflux, Atlas provided financial services and advice and created a private placement memorandum for Dataflux. Dataflux accepted the benefit of services provided by Atlas, yet has refused to pay for such benefits. Atlas would show that an action in *quantum meruit* lies against said Defendant for the reasonable value of financial services in the amount of not less than $1,348,000.

WHEREFORE, ATLAS prays for judgment against Dataflux as follows:

1. On the first claim for relief (breach of contract), compensation, expenses, and costs due under the contract according to proof and in any event not less than $1,348,000;

2. On the second claim for relief (quantum meruit), compensation, expenses, and costs to fairly and adequately compensate Atlas for the services provided to Dataflux, and this amount should not be less than $1,348,000.

3. On each claim for relief, for general and special damages as proved at trial;

4. On all claims for relief, for prejudgment interest thereon, post judgment interest thereon, and all costs of suit;

5. For its reasonable attorneys fees as allowed by law; and

6. For such other and further relief as the Court may deem just and proper and any other relief to which it is entitled.

Appendix F

V. JURY DEMAND

Plaintiff hereby requests a trial by jury on all issues.

Respectfully submitted,

By: s/ Roger B. Greenberg
ROGER B. GREENBERG
State Bar No. 08390000
Attorney in Charge
GREENBERG, PEDEN,
SIEGMYER & OSHMAN, P.C.
12 Greenway Plaza, 10th Floor
Houston, Texas 77046
(713) 627-2720
(713) 627-7057 FAX

OF COUNSEL:

ELIZABETH L. McDAVID
State Bar No. 00796710
GREENBERG, PEDEN, SIEGMYER
& OSHMAN, P.C.
12 Greenway Plaza, 10th Floor
Houston, Texas 77046
(713) 627-2720
(713) 627-7057 FAX

ATTORNEYS FOR PLAINTIFF

Appendix F

EXHIBIT B

Dated _____ Copy No. _____

CONFIDENTIAL
PRIVATE PLACEMENT MEMORANDUM

US$35,000,000

DATAFLUX, S.A. de C.V.

Maximum of 4,315,660 Shares of Series "L" (Limited Voting)

(Par Value Ps 1.00)

Price: US $8.11 per share

This Confidential Private Placement Memorandum (the "Memorandum") describes the offering for sale of stock in Dataflux, S.A. de C.V. (the "Company" or "Dataflux"), established under the laws of the United Mexican States ("Mexico"). The Company will offer up to 4,315,660 shares of its Series "L" (Limited Voting) Stock ("Series "L" Shares" or "Series "L" Stock") at a price of $8.11 per share. Dataflux is a holding company located at Carretera Nacional Km. 2.71. Colonia La Estanzuela, Monterrey, Nuevo León, Mexico, which through its operating subsidiaries, is engaged in the distribution of brand name microcomputer related hardware and software products to resellers and retailers throughout Mexico. The Series "L" Stock offered hereby has limited voting rights. See "*DESCRIPTION OF CAPITAL STOCK - Voting Rights.*"

Appendix F

NEITHER THESE SECURITIES NOR THIS MEMORANDUM HAVE BEEN REVIEWED, APPROVED OR DISAPPROVED BY THE UNITED STATES SECURITIES AND EXCHANGE COMMISSION OR ANY STATE SECURITIES COMMISSION OR SIMILAR AGENCY NOR HAS ANY SUCH AGENCY PASSED UPON THE ACCURACY OR ADEQUACY OF THIS MEMORANDUM OR THE INFORMATION CONTAINED HEREIN. ANY REPRESENTATION TO THE CONTRARY IS A CRIMINAL OFFENSE.

INVESTMENT IN THESE SECURITIES IS SPECULATIVE AND INVOLVES A HIGH DEGREE OF FINANCIAL RISK. THE SECURITIES SHOULD NOT BE PURCHASED BY INVESTORS WHO CANNOT AFFORD TO LOSE THEIR INVESTMENT. SEE "RISK FACTORS."

CERTAIN SIGNIFICANT RISKS INCLUDE: • EFFECTS OF EXCHANGE RATE FLUCTUATIONS, • ECONOMIC, POLITICAL AND SOCIAL CONDITIONS IN MEXICO • HOLDING COMPANY STRUCTURE • INABILITY TO TRANSFER SHARES • NO PUBLIC MARKET FOR SHARES • IMMEDIATE SUBSTANTIAL BOOK VALUE DILUTION • COMPETITION. SEE "RISK FACTORS."

THE SECURITIES DESCRIBED HEREIN ARE BEING OFFERED ON A BEST-EFFORTS BASIS. MINIMUM OF 3,082,614 SHARES OF LIMITED VOTING COMMON STOCK (US$25,000,000) AND A MAXIMUM OF 4,315,660 SHARES OF LIMITED VOTING STOCK (US$35,000,000). THE OFFERING PERIOD WILL TERMINATE ON DECEMBER 31, 1996, UNLESS EXTENDED BY THE COMPANY UP TO 90 DAYS.

Appendix F

	Price to Investor		Total Offering	
	Minimum	Maximum	Minimum	Maximum
Price Per Share	US $8.11	US $8.11	US $25,000,000.00	US $35,000,000.00
Commission	US $.308	US $.308	US $950,000.00	US $1,330,000.00
Proceeds to Company	US $25,000,000.00	US $35,000,000.00	US $24,050,000.00	US $33,670,000.00

Appendix F

Atlas Global Group, L.P.
5847 San Felipe, Suite 4540
Houston, Texas 77057
(713) 780-9570

The date of this Private Placement Memorandum
is October 30, 1996.

Appendix F

EXHIBIT C

LITIGATION RESOURCES

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C.A. NO. 97-3779

JURY TRIAL DEMANDED

ATLAS GLOBAL GROUP, L.P.,

Plaintiff,

VS.

GRUPO DATAFLUX,

Defendant.

ORAL DEPOSITION OF

OSCAR ROBLES

January 11, 2000

* * *

Appendix F

[5] **OSCAR ROBLES,**

having been first duly sworn, testified as follows:

EXAMINATION

BY MR. ROBERTSON:

Q. Would you please state your full name?

A. Oscar Orson Robles Canon.

Q. And should I call you Mr. Robles; is that right?

A. Robles, as you wish.

Q. Okay. Who do you work for?

A. I work for Atlas Global.

Q. And what is Atlas Global? Is it Atlas Global Group?

A. Atlas Global Group.

Q. What is Atlas Global Group?

A. Atlas Global is a U.S. based investment bank.

Q. Is it a corporation, a partnership? What is it?

A. It's a limited partnership.

Appendix F

Q. Who is the general partner of the limited partnership or — general or partner or partners?

A. I think it's Bahia Management.

Q. Can you spell that?

A. Bahia, B-A-H-I-A, Management.

Q. Is that a corporate entity?

[6] A. I think so. I think it's a corporation. Probably a limited liability corporation.

Q. How many partners are in the limited partnership of Atlas Global Group?

A. There are three partners.

Q. Who are the partners?

A. Oscar Robles, myself; Francisco Llamosa and Heptagon Financial.

Q. I'm sorry, is it — how did you say it, Bahia?

A. Bahia Management.

Q. Bahia. Who owns Bahia Management?

A. That's a corporation owned by Francisco Llamosa and myself.

Appendix F

Q. Previously there was an entity called Atlas Global Group, LP. Do you know the difference between Atlas Financial Group and Atlas Global Group?

A. It's the same entity.

Q. Same entity. Just a name change?

A. Yeah.

Q. Same partners?

A. (Nods head.)

Q. Is that a "yes"?

A. Yes.

Q. You say the Atlas Global Group is an investment bank. What does an investment bank do in general

* * * *

[13] did you work with investment bankers?

A. No.

Q. While in either position with Cemex, were you involved in any kind of a public offering or a private placement of securities?

A. No.

Appendix F

Q. Prior to the time that you worked for Cemex, what did you do? What job did you have prior to Cemex?

A. Prior to Cemex I was in charge of strategic planning, I was the strategic planning director for the chemical division — chemical and plastics division of Grupo Cydsa.

Q. I'm sorry, when you were director of U.S. operations for Cemex, where did you live?

A. In Monterrey.

Q. And you did that job from Monterrey?

A. I had to commute a lot. We used to have an office here in Houston and I used to travel a lot to Houston, Phoenix, California.

Q. In your position as strategic planning director for the chemicals and plastic division at Grupo Cydsa, what did you do?

A. I was preparing and overviewing the execution of the business plan for all the companies within that division.

* * * *

Appendix F

SIGNATURE OF WITNESS

I, OSCAR ROBLES, solemnly swear or affirm under the pains and penalties of perjury that the foregoing pages contain a true and correct transcript of the testimony given by me at the time and place stated with the corrections, if any, and the reasons therefor noted on the foregoing correction page(s), and that I am signing this before a Notary Public.

s/ Oscar Robles
OSCAR ROBLES

STATE OF T E X A S

COUNTY OF HARRIS

SUBSCRIBED AND SWORN TO BEFORE ME BY OSCAR ROBLES on this, the 17th day of February, 2000.

Appendix F

EXHIBIT D

LITIGATION RESOURCES

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C.A. NO. 97-3779

ATLAS GLOBAL GROUP, L.P.,

Plaintiff,

VS.

GRUPO DATAFLUX,

Defendant.

ORAL DEPOSITION OF

ANTONIO MARZIALE

February 21, 2000

* * *

Appendix F

ANTONIO MARZIALE,

[4] having been first duly sworn, testified as follows:

EXAMINATION

BY MR. ROBERTSON:

Q. Would you please state your full name?

A. Antonio Marziale, M-A-R-Z-I-A-L-E.

Q. Mr. Marziale, who do you work for?

A. Heptagon Capital Management.

Q. And what is your title at Heptagon Capital Management?

A. President.

Q. What does Heptagon Capital Management do?

A. It's involved in asset management mostly.

Q. And what is asset management?

A. We invest or study opportunity for investments and also are involved in money management.

Appendix F

Q. What would money management mean, is that what you said, money management?

A. Money manager..

Q. What is that?

A. Investing on behalf of clients in bonds, stocks and, you know, financial instruments.

Q. Are your clients for money management, are they individuals or are they businesses?

A. They are a mixture of both.

* * *

[8] Q. (BY MR. ROBERTSON) Prior to the time you worked at Paribas Bank, were you a full-time student?

A. Yes.

Q. Is Heptagon Capital Management a partner in Atlas?

A. No.

Q. Is there a Heptagon entity that is the — a partner in Atlas?

A. Yes, a parent company, Heptagon Investments.

Appendix F

Q. What is your relationship, if any, with Heptagon Investments?

A. I'm a managing director.

Q. When you say a managing director, what does that — is that something different than a director?

A. Yes. A director is considered an advisor to the company manager and the managing director attends to the affairs of the business.

Q. What do you do as a managing director in general terms for Heptagon Investments?

A. Source deals and get involved in the management of Heptagon Investments's participations.

Q. What does Heptagon Investments do?

A. It's a — if I can classify it this way, it's a mini merchant banking firm. It's a boutique merchant banking firm.

[9] Q. And can you give a brief description for the jury about what a merchant bank does?

A. Merchant bank is a company that invests its own capital in opportunities that it sources or that are being presented to itself.

Appendix F

Q. Now, how is that different than what Heptagon Capital does?

A. Well, Heptagon Capital is a subsidiary of Heptagon Investments so there is some interlapping in the activities; but Heptagon Capital Management was — it's a U.S. subsidiary that is a SCC registered; whereas, the Heptagon Investments is an offshore group.

Q. When Heptagon Capital invests, is it their own money —

A. No.

Q. — its clients money or Heptagon Investments' money?

A. It can either be a client's money, if it has a relationship with the client or most of the time it's Heptagon Investments' money.

Q. What is your relationship, if any, with Atlas?

A. My relationship with Atlas is to the investment of Heptagon Investments as mainly Atlas.

Q. And what kind of investments has Heptagon Investments made in Atlas?

* * * *

Appendix F

SIGNATURE OF WITNESS

I, ANTONIO MARZIALE, solemnly swear or affirm under the pains and penalties of perjury that the foregoing pages contain a true and correct transcript of the testimony given by me at the time and place stated with the corrections, if any, and the reasons therefor noted on the foregoing correction page(s), and that I am signing this before a Notary Public.

s/ Antonio Marziale
ANTONIO MARZIALE

APPENDIX G — PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION FILED NOVEMBER 22, 2000

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

C.A. NO. H-97-3779

ATLAS GLOBAL GROUP, L.P.,

Plaintiff,

vs.

GRUPO DATAFLUX,

Defendant.

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiff Atlas Global Group, L.P. files this its Response to Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction and in support thereof would respectfully show the Court as follows:

I.

INTRODUCTION

1. On November 18, 1997, Plaintiff Atlas Global Group, L.P., (hereinafter "Atlas") sued Defendant Dataflux (hereinafter "Dataflux"). On November 8, 2000, **almost four years later *and* after a week-long trial *and* after jury verdict in Atlas's favor**, Dataflux has filed a motion to challenge this Court's jurisdiction. Dataflux did not challenge this Court's diversity jurisdiction prior to these events, despite the fact that Dataflux has known all the information contained in its motion for years.[1] Thus, Dataflux's motion appears to be nothing more than a dilatory last-ditch effort to prevent a judgment from being entered against Dataflux. As set forth herein, Dataflux's Motion to Dismiss for Lack of Subject Matter Jurisdiction ("Motion to Dismiss") must be denied.

II.

RELEVANT PROCEDURAL BACKGROUND

2. Plaintiff Atlas was and is a limited partnership based in Houston, Texas, that specializes in financial advice and consultation and equity placement. *See* **Exhibit A**, Affidavit of Antonio Marziale (hereinafter "Marziale"). Defendant Dataflux is a company based in Monterrey, Mexico. Diversity jurisdiction was invoked based upon the fact that Atlas, a

1. In fact, on October 3, 2000, Dataflux signed the Consent to Proceed Before a Magistrate, consenting to transfer the case to United States Magistrate Judge Frances Stacy, and agreeing that Judge Stacy conduct all further proceedings, including final judgment.

Houston-based limited partnership, sued Dataflux, an alien. *See* **28 U.S.C. § 1332(a)(2)**.

3. Dataflux now contends that because two of Atlas's limited partners are aliens complete diversity does not exists. Dataflux contends that Oscar Robles ("Robles"), a former limited partner of Dataflux, is a citizen of Mexico and Heptagon Investments is a British Virgin Islands company. Atlas admits that Robles is a citizen of Mexico, but "Heptagon Investments" is not a partner of Atlas. Rather, the "Heptagon"-related partner of Atlas is HIL Financial Holdings, L.P., a Texas limited partnership, and not an alien as Dataflux contends. *See* **Exhibit A**.

4. In 1996, the Atlas partnership was composed of the following entities: (1) Bahia Management, L.L.C., a Texas limited liability company, was the managing general partner; (2) Capital Financial Partner, Inc., a Delaware corporation, was a general partner; (3) HIL Financial Holdings, L.P., a Texas limited partnership, was a limited partner; (4) Francisco Llamosa ("Llamosa"), a Mexican citizen, was a limited partner; and (5) Robles, a Mexican citizen, was a limited partner. *See* **Exhibit A**, Affidavit of Marziale.

5. Dataflux's motion presupposes that Robles and "Heptagon Investments" are aliens which divest this Court of jurisdiction. Dataflux, however, mistakenly avers that Robles and "Heptagon Investments" are the two aliens that have allegedly divested this Court of diversity jurisdiction. In fact, however, the only two aliens that Dataflux could possibly have complained of are Robles and Llamosa. Secondly, Dataflux's motion presupposes that the citizenship

of these third party defendants is to be considered in assessing diversity jurisdiction. Atlas disputes that the citizenship of these two individuals affects jurisdiction. Even assuming, ***arguendo***, however, that Llamosa and Robles' citizenship was considered in assessing diversity, they are no longer limited partners in Atlas. On or about April 1, 2000, the partnership of Atlas changed. Robles and Llamosa are no longer partners of Atlas. ***Id.*** At this time, the limited partners of Atlas are: (1) HIL Financial Holdings, L.P., a Texas limited partnership,[2] and (2) Capital Financial Partner, Inc., a Delaware corporation. ***Id.*** Finally, Dataflux's motion presupposes that the former limited partners are necessary plaintiffs to this action. Dataflux, however, has never objected or moved this Court to join them as plaintiffs. Diversity jurisdiction is therefore proper and Defendant's Motion to Dismiss should be denied as set forth herein.

III.

ARGUMENT AND AUTHORITIES

6. Dataflux argues that satisfaction of diversity jurisdiction for a partnership includes an examination of the citizenship of its limited partners as well as its general partners. *See* ***Carden v. Arkoma Assoc.***, 494 U.S. 185, 187-196, 110 S. Ct. 1015, 1016-21, 108 L. Ed.2d 157 (1990). Atlas does not dispute this general legal principle. In the instant case, however, Robles and Llamosa as limited partners did not file this lawsuit: Atlas, the limited partnership itself, filed this suit. As shown in Section III, Robles and Llamosa

2. The sole partner of HIL Financial Holdings is OVH, Inc., a Texas corporation.

as limited partners, could not have filed this suit in the absence of certain circumstances, none of which exists in this case. Moreover, Dataflux added Llamosa and Robles as additional parties to Dataflux's counterclaim, and as such, their citizenship is irrelevant to the jurisdictional analysis of the Plaintiff. Finally, even assuming, ***arguendo***, that Llamosa's and Robles' citizenship was to be considered, diversity jurisdiction can and should be preserved by dismissing them in their capacity as unnamed former limited partner plaintiffs, to the extent these two individuals could have ever even been considered Plaintiffs.

Llamosa and Robles Were Never Plaintiffs In This Lawsuit

7. Atlas sued Dataflux on November 18, 1997, but Dataflux did not file its counterclaim against Atlas until November 30, 1998. *See* **Exhibit B**, Defendant's Original Answer and Counterclaim. On December 9, 1998, Dataflux filed a Motion for Leave to Add Counterdefendants. *See* **Exhibit C**, Counterplaintiff's Motion for Leave to Add Counterdefendants. In this Motion, Dataflux asked the Court for leave to add Llamosa and Robles as parties to Dataflux's counterclaim. The Court granted this motion on January 7, 1999. *See* **Exhibit D**, Order of January 7, 1999. Dataflux thereafter served Llamosa and Robles individually with Dataflux's counterclaim. Until now, Dataflux has never maintained that Llamosa and Robles are plaintiffs in this lawsuit. *See* **Exhibit E**, Defendant's First Amended Counterclaim. Simply put, if Robles and Llamosa had been plaintiffs, then Dataflux would not have had to ask this Court for leave to add them as additional parties to the counterclaim.

Thus, as the record in this case demonstrates, Llamosa and Robles were adverse to the Defendant's counterclaim as additional parties. Thus, their citizenship have no bearing on the authority of the federal court to adjudicate the diversity claims Atlas asserted against Dataflux.[3]

8. Desp te the fact that Dataflux added Robles (and Llamosa) as additional parties to the lawsuit, Dataflux now claims that Robles is actually a plaintiff to this lawsuit whose citizenship must be considered for jurisdictional purposes. To support its theory, Dataflux cites a Second Circuit case, ***Franceskin v. Credit Suisse***,[4] for the proposition that "no diversity jurisdiction existed between an Argentinian plaintiff and Swiss defendant because federal courts lack subject matter jurisdiction over state law claims among aliens."

3. *See* ***Caterpillar Inc. v. Lewis***, 519 U.S. 61, 66-67 n.1, 117 S. Ct. 467, 476, 136 L. Ed. 2d 437 (1996) (citing ***Wichita Railroad & Light Co. v. Public Util. Common of Kan.***, 260 U.S. 48, 54, 43, S. Ct. 51, 53, 67 L. Ed. 124 (1922) (federal jurisdiction once acquired on the ground of complete diversity of citizenship which is unaffected by the subsequent intervention "of a party whose presence is not essential to a decision of the controversy between the original parties."). As elaborated in 3 J. Moore, Moore's Federal Practice ¶ 14.26, p. 14-116 (2d ed. 1996) (footnotes omitted): "Once federal subject matter jurisdiction is established over the underlying case between [plaintiff] wife and [defendant], the jurisdictional propriety of each additional claim is to be assessed individually. Thus, assuming that jurisdiction is based upon diversity of citizenship between [plaintiff] and [defendant] the question concerning impleader is whether there is a jurisdictional basis for the claim by [defendant] against [third-party defendant]. The fact that [plaintiff] and [third-party defendant] may be co-citizens is completely irrelevant.

4. 214 F.3d 253, 257 (2nd Cir. 2000).

The premise that Article III judicial power does not extend to cases in which the only parties are aliens is not novel law. The instant case, however, does not involve a dispute between an alien plaintiff and an alien defendant, as in ***Franceskin***. The instant case involves citizens of different states suing an alien. Thus, the ***Franceskin*** case is distinguishable and is inapplicable to the situation at hand.

9. While Llamosa and Robles were at one time limited partners of Atlas, their limited partnerships in Atlas no longer exists. *See* **Exhibit A**. Moreover, Dataflux never contended that these two individuals were indispensable or necessary party Plaintiffs. Thus while Atlas acknowledges jurisdiction is not waiveable, Dataflux's failure to move to add Llamosa and Robles as party plaintiffs has been waived. In any event, if this Court determines that the citizenship is to be considered and to the extent this Court finds that **these two former limited partners are non-diverse, unnamed "plaintiffs," they are dispensable and diversity jurisdiction exists.**

II.

DIVERSITY JURISDICTION MUST BE MAINTAINED

10. If this Court finds that the citizenship of former partners Robles and Llamosa are to be considered for purposes of diversity jurisdiction, then Atlas respectfully requests that this Court dismiss them in their capacity as Plaintiffs.

Appendix G

To the Extent Necessary, Plaintiff Moves This Court to Dismiss Dispensable Non-Diverse Former Limited Partners

11. To wipe out diversity in this case on the eve of a judgment being entered and to dismiss a case that satisfies all federal jurisdictional requirements would impose an exorbitant cost on our court system, a cost incompatible with the fair and unprotracted administration of justice. The Supreme Court has also emphasized that "requiring dismissal after years of litigation would impose unnecessary and wasteful burdens on the parties, judges, and other litigants waiting for judicial attention." *See* ***Newman-Green, Inc. v. Alfonzo-Larrain***, 490 U.S. 826, 104 L. Ed. 2d 893, 109 S. Ct. 2218 (1989). The Supreme Court has also stated that **"once a diversity suit has been tried in federal court . . . considerations of finality, efficiency, and economy become overwhelming."** *See* ***Caterpillar Inc. v. Lewis***, 519 U.S. 61, 75, 117 S. Ct. 467, 476, 136 L. Ed. 2d 437 (1996). In the instant case, where litigation has been ongoing for almost four years and the parties now await the final judgment to be entered after a week-long jury trial, the considerations of finality, efficiency, and economy are overwhelming. If necessary, this Court should save diversity jurisdiction by dismissing Robles and Llamosa (at least, in their capacity as former limited partners Plaintiffs) and by retaining them in this suit only in their capacity as additional parties to Dataflux's counterclaim. The United States Supreme Court has held that a court has the power to dismiss a dispensable nondiverse party from a suit under Rule 21 of the Federal Rules of Civil Procedure in order to salvage jurisdiction. ***Id.*** at 832-33 (extending Rule 21 of the Federal Rules of Civil Procedure to appellate courts).

Appendix G

Rule 21 Empowers the Court to Dismiss Robles and Llamosa If They Are Plaintiffs

12. A court may dismiss a party from a suit under Federal Rule of Civil Procedure 21. *See* **FED. R. CIV. P.** 21 ("Parties may be dropped or added by order of the court on motion of any party or *of its own initiative* at any stage of the action and on such terms as are just."). A court may also dismiss a dispensable non-diverse party in order to salvage its diversity jurisdiction. *See* **FED. R. CIV. P.** 19. In making its determination, the Court must carefully consider whether the dismissal of a nondiverse party will prejudice any of the parties in the litigation." ***Newman-Green***, 490 U.S. at 838. Moreover, whether a party is "'indispensable, that is whether a particular lawsuit must be dismissed in the absence of that person, can only be determined in the context of particular litigation." ***Provident Tradesmens Bank & Trust Co. v. Patterson***, 390 U.S. 102, 118, 88 S. Ct. 733, 742, 19 L. Ed. 2d 936 (1968). In other words, "the effect on the parties and on the litigation process is to be the fulcrum of [the] decision." ***Broussard v. Columbia Gulf Transmission Co.***, 398 F.2d 885, 888 (5th Cir. 1968) ("Rule 19 is designed to ameliorate the catechistic distinction between 'necessary' and 'indispensable' parties, which had sometimes subordinated logic and reality to historical encrustations. Pragmaticals are to be the solvents of joinder problems, replacing former rigid terminological descriptions of the parties.").

13. Rule 19 of the Federal Rules of Civil Procedure provides in part:

> A person who is subject to service of process and whose joinder will not deprive the court of

> jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations . . .

FED. R. CIV. P. 19.

Rule 19 allows joinder of necessary parties unless that joinder would defeat diversity jurisdiction. When jurisdiction is threatened, the Court must then determine whether the potentially joined party is in fact indispensable, meaning the action cannot proceed without such party. *See **Clark v. Kick***, 79 F.Supp.2d 747, 753 (S.D. Tex. 2000). Rule 19 lists four factors to consider when deciding whether a party is indispensable: (1) prejudice to the absent party or to those involved in the lawsuit; (2) whether relief can be shaped to lessen the prejudice to existing parties; (3) whether relief can be given without the absent party; and (4) whether the plaintiff has another forum in which to prosecute the action if it is dismissed. ***Id.*** In the instant case, the facts establish that Robles and Llamosa are not indispensable plaintiffs. First, no prejudice to Dataflux would be caused by Llamosa and Robles' presence in the lawsuit in their capacities as additional parties to the counterclaim.

Robles and Llamosa Could Not Have Even Filed This Suit

14. Because Robles and Llamosa were only limited partners in the Atlas partnership, their ability to file suit to recover a judgment in favor of Atlas was severely limited by the Texas Revised Limited Partnership Act. Thus, relief to Atlas could be provided without Robles and Llamosa as plaintiffs. Section 10.01 of the Texas Revised Limited Partnership Act provides that limited partners may bring an action to recover a judgment in the limited partner's favor only under certain defined circumstances, none of which exists in the instant case:

> Sec. 10.01. A limited partner may bring an action in a court of competent jurisdiction in the right of the limited partnership to recover a judgment in the limited partnership's favor **if all general partners with authority to do so have refused to bring the action or if an effort to cause those general partners to bring the action is not likely to succeed.**

TEX. REV. CIV. STAT. ANN., art. 6132a-1, § 10.01 (West Supp. 2000).

In the instant case, no general partners refused to bring the instant action. Thus, in their capacity as limited partners, Robles and Llamosa were even not authorized to file suit on behalf of Atlas. It is axiomatic that Robles and Llamosa were not, therefore, necessary party plaintiffs in the instant action.

15. This Court has held that under certain circumstances, the citizenship of limited partners can be disregarded for diversity purposes. *See* ***Mallia v. PaineWebber, Inc.***, 889 F. Supp. 277, 283 (S.D. Tex. 1995) (holding that the partnerships were nominal parties and that, although they were residents of Texas under ***Carden***, the Court was not divested of diversity jurisdiction and their citizenship should be ignored for diversity purposes). This, likewise, is certainly a case where the citizenship of two former limited partners should be disregarded for diversity purposes. Llamosa and Robles are already additional third parties and finally, these non-diverse parties are not indispensable to Atlas's recovery.

16. Although a full citation was not provided, Dataflux cites to a second case in its motion. Atlas assumes that Dataflux was citing ***Giannakos v. M/V Bravo Trader***, 762 F.2d 1295 (5th Cir. 1985). ***Giannakos*** does hold that diversity does not exist where aliens are on both sides of the litigation. ***Id.*** at 1298. However, the issue of whether the non-diverse party was an indispensable party was not addressed in that case. ***Id***. at 1298-99.

CONCLUSION

17. As the Supreme Court commented in ***Newman-Green***, nothing but a waste of time and resources would be engendered by dismissing this case and by forcing these parties to begin anew. This cannot be more true in the instant case, where Atlas had to serve Dataflux via the Inter-American Convention on Letters Rogatory and its Additional Protocol - a process took many months to complete and the parties have completed a week-long jury trial. Dataflux's last

minute motion must be seen for what it really is: yet another hurdle to prevent Atlas from recovering against Dataflux. This case is in a post-trial posture. No valid reason exists at this belated juncture to provide Dataflux with a windfall escape from the jury's adverse findings at trial.

PRAYER

WHEREFORE, PREMISES CONSIDERED Atlas Global Group, L.P. prays that this Court deny Defendant Dataflux's Motion to Dismiss for Lack of Subject Matter Jurisdiction and for such other and further relief, both general and special, at law or in equity, to which Plaintiff may show itself justly entitled to receive.

Respectfully submitted,

s/ Roger B. Greenberg
ROGER B. GREENBERG
State Bar No. 08390000
Attorney-in-Charge
12 Greenway Plaza, 10th Floor
Houston, Texas 77046
Telephone No.: (713) 627-2720
Facsimile No.: (713) 627-7057

Appendix G

OF COUNSEL:

ELIZABETH L. HODGES
State Bar No. 00796710
GREENBERG PEDEN P.C.
12 Greenway Plaza, 10th Floor
Houston, Texas 77046
Telephone No.: (713) 627-2720
Facsimile No.: (713) 627-7057

ATTORNEYS FOR PLAINTIFF AND COUNTERCLAIM DEFENDANTS ATLAS GLOBAL GROUP, L.P., FRANCISCO LLAMOSA AND OSCAR ROBLES

Appendix G

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C.A. NO. H-97-3779

ATLAS GLOBAL GROUP, L.P.,

Plaintiff,

vs.

GRUPO DATAFLUX,

Defendant.

AFFIDAVIT OF ANTONIO MARZIALE

STATE OF TEXAS §
§
COUNTY OF HARRIS §

Before me, the undersigned authority, personally appeared Antonio Marziale, who, being by me first duly sworn, deposed as follows:

> "My name is Antonio Marziale. I am over the age of 18 years and have never been convicted of a felony. I am competent, qualified, and authorized to make this affidavit. I have personal knowledge of the matters stated herein, and all such matters

are true and correct. I am acquainted with the facts herein based upon my affiliation as president of Capital Financial Partner, Inc., the managing partner of Atlas Global Group, L.P. ("Atlas").

Plaintiff Atlas is a limited partnership based in Houston, Texas that specializes in financial advice and consultation and equity placement. In 1996, the Atlas partnership was composed of the following entities: (1) Bahia Management, L.L.C., a Texas limited liability company, was the managing general partner; (2) Capital Financial Partner, Inc., a Delaware corporation, was a general partner; (3) HIL Financial Holdings, L.P., a Texas limited partnership, was a limited partner; (4) Francisco Llamosa, a Mexican citizen, was a limited partner; and (5) Oscar Robles, a Mexican citizen, was a limited partner.

On or about April 1, 2000, however, the partners of Atlas changed. Oscar Robles and Francisco Llamosa withdrew as partners of Atlas, as did Bahia Management, L.L.C. At this time, the partners of Atlas are: (1) HIL Financial Holdings, L.P., a Texas limited partnership, and (2) Capital Financial Partner, Inc., a Delaware corporation. The partners of HIL Financial Holdings are OVH, Inc., a Texas corporation, and OFI Management, a Delaware corporation.

In 1997, when Atlas decided to file suit against Dataflux, the general partners consented to bring the instant action. None of the general partners refused to file suit against Dataflux.

Further Affiant sayeth not."

s/ Antonio Marziale
ANTONIO MARZIALE

Appendix G

EXHIBIT B

[Defendant's Original Answer and Counterclaim
Filed November 30, 1998, has been printed
as Appendix D, pp. 34a-44a]

Appendix G

EXHIBIT C

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

C.A. NO. 97-3779

ATLAS GLOBAL GROUP, L.P.,

Counterdefendant,

vs.

GRUPO DATAFLUX,

Counterplaintiff.

**COUNTERPLAINTIFF'S MOTION
FOR LEAVE TO ADD COUNTERDEFENDANTS**

Counterplaintiff Dataflux S.A. de C.V. files this Motion For Leave To Add Counterdefendants pursuant to Fed. R. Civ. P. 13(h).

I. *Background.*

On November 30, 1998, counterplaintiff filed its answer and counterclaim. Counterplaintiff is filing its First Amended Counterclaim at the same time as it files this motion ten days after it filed the original Counterclaim. The First Amended Counterclaim adds the two persons as counterdefendants who

made the misrepresentations to Dataflux on which Dataflux bases its counterclaim – Francisco Llamosa and Oscar Robles-Cañon.

II. *Rationale For This Motion.*

"Although not required by Rule 13(h), the general practice is to obtain a court order to join an additional party." Wright, Miller & Kane, FED. PRAC. & PROC., Civil 2d 1434, at 270. In an abundance of caution, counterplaintiff seeks this Court's permission before serving the two new counterdefendants. Compare *Northfield Ins. v. Bender Shipping & Repair Co.*, 122 F.R.D. 30 (S.D. Ala. 1988) (no order required to add counterdefendant) with *Mountain States Sports, Inc. v. Sharman*, 353 F. Supp. 613, 618 (D. Utah 1972) (order required before service appropriate on counterdefendant).

III. *The Addition Of New Counterdefendants Is Appropriate.*

The addition of these parties is timely, will not prejudice the interests of any party, and is necessary to the full and fair adjudication of this action. No discovery has occurred. Furthermore, the First Amended Counterclaim is being filed only ten days[1] after the original Counterclaim was filed. Moreover, no significant deadlines have passed and plenty of time remains before trial will occur for discovery. Because no

1. "'[S]ince the 1963 amendment of Rule 14 now provides that no leave of court is required to bring in new parties if the third party complaint is filed no later than ten days after service of the original answer, the same policy ought to be applicable to counterclaims filed in the answer.'" *Northfield Ins.*, 122 F.R.D. at 32, quoting 3 J. Moore, MOORE'S FED. PRAC., ¶ 13.39, ftn. 27 (2d ed. 1987).

discovery has occurred and because no deadlines have passed, the newly added counterdefendants will be on essentially the same footing as their employer or former employer Atlas – the other counterdefendant in the case. Therefore, Dataflux should be allowed to serve and add Mr. Llamosa and Mr. Robles-Cañon as counterdefendants. *See Clark v. Universal Builders, Inc.*, 501 F.2d 324, 339 (7th Cir.) (error not to allow the addition of parties late in the case (a) when no prejudice existed to defendants and (b) when the new defendants had been active participants in the case), *cert. denied*, 419 U.S. 1070 (1974).

Respectfully submitted,

Mark A. Robertson
State Bar No. 17066720
1301 McKinney, Suite 5100
Houston, Texas 77010-3095
Telephone: 713/651-5151
Telecopier: 713/651-5249
Attorney-In-Charge
For Counterplaintiff
Dataflux S.A. de C.V.,
sued as Grupo Dataflux

OF COUNSEL:
William R. Pakalka
State Bar No. 15420800
Fulbright & Jaworski L.L.P.
1301 McKinney, Suite 5100
Houston, Texas 77910-3095
Telephone: 713/651-5151
Telecopier: 713/651-5246

Appendix G

EXHIBIT D

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-97-3779

ATLAS GLOBAL GROUP, INC.,

Plaintiff,

v.

GRUPO DATAFLUX,

Defendant.

ORDER

Before the Magistrate Judge upon referral from the District Judge is Counterplaintiff's Motion for Leave to Add Counterdefendants (Document No. 21). After having reviewed the parties arguments, the applicable law, and the procedural posture of this case, it is

ORDERED that Counterplaintiff's Motion for Leave to Add Counterdefendants (Document No. 21) is GRANTED. Counterplaintiff Grupo Dataflux shall proceed to serve Counterdefendants Francisco Lllamosa and Oscar Robles-Canon with all due haste.

Appendix G

Signed at Houston, Texas this 7th day of January, 1999.

s/ Frances H. Stacy
FRANCES H. STACY
UNITED STATES MAGISTRATE JUDGE

Appendix G

EXHIBIT E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C.A. NO. 97-3779

ATLAS GLOBAL GROUP, L.P.,

Plaintiff,

vs.

GRUPO DATAFLUX,

Defendant.

DEFENDANT'S FIRST AMENDED COUNTERCLAIM

Defendant Dataflux S.A. de C.V., sued as "Grupo Dataflux," files this its first amended counterclaim.

PARTIES

1. Counterplaintiff Dataflux S.A. de C.V. has appeared in this lawsuit.

2. Counterdefendant Atlas Global Group has appeared in this lawsuit.

3. Counterdefendant Oscar Robles-Cañon was or is an officer with Atlas Global Group. He can be served at Abasolo 827 ote., Colonia Centro, Monterrey, Nuevo León, México 64000.

Appendix G

4. Counterdefendant Francisco Llamosa is an officer with Atlas Global Group. He can be served at Atlas Global Group, 5847 San Felipe, Suite 4540, Houston, Texas 77057.

FACTS

5. In the summer of 1996, Llamosa and Robles-Cañon approached Dataflux and explained to Dataflux that Atlas — an investment bank — was available to assist Dataflux with a private placement of securities. Both Llamosa and Robles-Cañon explained that they, and the other employees of Atlas, were experienced in the private placement of securities and had a great number of contacts which would enable Atlas to successfully complete a private placement. They even identified a number of funds with which they had close contacts. Also at the meeting in Houston, Texas, Llamosa and Robles-Cañon explained in a written brochure that Dataflux would be able to raise "not less than" between $20 million and $25 million in a private placement based on a market valuation of Atlas that they estimated at between $148 million and $190 million. They then explained that they believed the market value for the private placement could be as high as $220 million. The private placement memorandum created by Atlas sought to raise between $25 million and $35 million. As a result of the representations of Llamosa and Robles-Cañon, Dataflux decided to enter into an agreement with Atlas to make a private placement offering instead of undertaking a public offering with a firm capable of raising the kind of capital Dataflux sought.

6. Even though Llamosa and Robles-Cañon claimed that Dataflux would be able to raise money in a private placement

of securities based on a market valuation of between $148 million and $220 million, Atlas now claims that the DLJ proposal in January 1997 that used a market valuation of $80 million was the reasonable amount that Dataflux should have expected from the private placement offering. In other words, Llamosa and Robles-Cañon knew that the valuation for the private placement could not be achieved and yet they represented to Dataflux that the valuation of between $148 million and $220 million could be achieved through a private placement. Furthermore, Llamosa and Robles-Cañon and Atlas did not have the connections they represented they had that would make the private placement successful. If Llamosa and Robles-Cañon would not have mislead Dataflux about the amount of capital that could be raised in a private placement and about Atlas' abilities, Dataflux would not have entered into the agreement with Atlas.

7. As a result of the misleading misrepresentations made by Llamosa and Robles-Cañon on behalf of Atlas, Dataflux was without the $29.7 million it raised through a public offering for at least six months. Further, Dataflux employees spent time and money in working with Atlas as a result of the misrepresentations. Because the counterdefendants' fraudulent and/or negligent misrepresentations caused injury to Dataflux, Dataflux files this counterclaim to recover its losses. Dataflux also seeks punitive damages for the fraud committed by the counterdefendants.

PRAYER

Dataflux prays that Atlas, Llamosa, and Robles-Cañon appear and be held liable for the damages caused by fraudulent or negligent misrepresentations made by Llamosa, Robles-Cañon and Atlas. Dataflux also seeks punitive damages for the tortious conduct of Atlas, Llamosa, and Robles-Cañon.

Respectfully submitted,

Mark A. Robertson
State Bar No. 17066720
1301 McKinney, Suite 5100
Houston, Texas 77010-3095
Telephone: 713/651-5151
Telecopier: 713/651-5246
Attorney-In-Charge For Defendant
Dataflux S.A. de C.V.,
sued as Grupo Dataflux

OF COUNSEL:
William R. Pakalka
State Bar No. 15420800
Fulbright & Jaworski L.L.P.
1301 McKinney, Suite 5100
Houston, Texas 77910-3095
Telephone: 713/651-5151
Telecopier: 713/651-5246

APPENDIX H — DATAFLUX'S REPLY TO ATLAS' RESPONSE TO DEFENDANT'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION FILED NOVEMBER 27, 2000

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

C.A. NO. 97-3779

ATLAS GLOBAL GROUP, L.P.,

Plaintiff and Counterdefendant,

vs.

GRUPO DATAFLUX,

Defendant and Counterplaintiff.

DATAFLUX'S REPLY TO ATLAS' RESPONSE TO DEFENDANT'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

Defendant Dataflux S.A. de C.V. ("Dataflux") files this its Reply to Atlas' Response To Dataflux's Motion to Dismiss for Lack of Subject Matter Jurisdiction.

Appendix H

I. *Atlas Admits That The Two Mexican Limited Partners Destroys Diversity.*

Atlas admits that at least two of the limited partners in Atlas at the time this lawsuit was filed are citizens of Mexico, like Dataflux. Atlas also admits that the citizenship of each limited partner in a limited partnership that brings a lawsuit must be examined for purposes of diversity under the holding of *Carden v. Arkoma Assoc.*, 494 U.S. 185, 195 (1990) ("diversity jurisdiction in a suit by or against the entity depends on the citizenship of 'all its members.'") Plaintiff's Response at 4. Atlas likewise admits that a foreign plaintiff and a foreign defendant in the same case destroys diversity. Plaintiff's Response at 5. Further, Atlas does not dispute that a subject matter jurisdiction challenge can be raised at any time. Each of these admissions requires dismissal of this lawsuit.

II. *Subject Matter Jurisdiction Is Determined At The Time The Lawsuit Was Filed.*

Diversity jurisdiction is determined as of the time when a lawsuit is filed, even if a change in the citizenship of a party occurs during the pendency of a lawsuit that would have been sufficient to confer diversity jurisdiction if the event had occurred prior to the filing of the lawsuit. *See, e.g., Sarmiento v. Texas Bd. of Veterinary Medical Examiners*, 939 F.2d 1242, 1246 n. 6 (5th Cir. 1991) (vacating district court's judgment even though plaintiff had moved to a diverse state during the course of the lawsuit); *American Foundation, Inc. v. Mountain Lake Corp.*, 454 F.2d 200, 202

(5th Cir. 1972) (holding that a change in citizenship during the pendency of a suit cannot create diversity jurisdiction).

"[I]f diversity of citizenship did not exist when the action was commenced, it cannot be created by a later change of domicile by one of the parties or some other event." WRIGHT, ET AL., FEDERAL PRACTICE & PROCEDURE § 3608, at 458 (1984). *See also Faysound Ltd. v. United Coconut Chemicals, Inc.*, 878 F.2d 290, 296 (9th Cir. 1989) ("Subsequent events do not confer jurisdiction. . . . What happened in May 1988 could not confer jurisdiction in December 1987."); *Aetna Cas. & Sur. Co. v. Hillman*, 796 F.2d 770, 776 (5th Cir. 1986) ("The citizenship of a party at the *commencement* of the action is controlling for purposes of determining diversity jurisdiction and subsequent actions do not affect the court's jurisdiction. . . . Jurisdiction cannot be created retroactively by substituting a diverse claimant for a nondiverse party."); *Scott v. Communications Services, Inc.*, 762 F. Supp. 147, 151 (S.D. Tex. 1991) ("The change of a party's citizenship after commencement does not affect this court's diversity jurisdiction. . . . If MLD, instead of merging with CSI, had reincorporated itself in New Jersey and moved to New York, the result would be the same."), *aff'd* 961 F.2d 1571 (5th Cir. 1992). As a result, Atlas' alleged change of citizenship[1] in the midst of the lawsuit cannot create federal court subject matter jurisdiction. *Scott*, 762 F. Supp. at 151 (merger with company in another state after the institution of the suit did

1. Not only did Atlas keep the limited partners secret from this Court, the jury and defense counsel until its latest filing, it continues to keep the allegedly new general partner secret from the Texas Secretary of State where Mr. Llamosa (a Mexican citizen) is still identified as the registered agent and Bahia Management is still identified as the general partner. Ex. A.

not create diversity jurisdiction). The "substituti[on of] a diverse claimant for a nondiverse party" does not create jurisdiction in this case. *Aetna*, 796 F.2d at 776.

III. *No Dispensable Party Exists To Dismiss To Save Jurisdiction.*

In an effort to solve the lack of jurisdiction, Atlas proposes that the limited partners be dismissed from the lawsuit. Plaintiff's Response at 6. The absence of jurisdiction in this case is not created because Mr. Robles and Mr. Llamosa are plaintiffs. Instead, the absence of jurisdiction exists because the citizenship of the plaintiff, Atlas, itself is based on the citizenship of Mr. Robles and Mr. Llamosa. *Carden*, 494 U.S. at 195. Even the case cited by Atlas - *Mallia v. PaineWebber, Inc.*, 889 F. Supp. 277 (S.D.Tex 1995) - recognized that "claims brought for harms sustained by the limited partnership itself" require the use of the citizenship of the limited partners to determine whether diversity exists. 889 F. Supp. at 281. Unlike *Mallia*, the limited partnership in this case is not a nominal party; it is the only plaintiff. Therefore, Atlas' citizenship must be determined by its limited partners at the time the lawsuit was instituted. *Carden*, 494 U.S. at 195; *Mallia*, 889 F. Supp. at 281. Only one plaintiff and one defendant exist in this case. No additional, dispensable parties exist that can be dismissed to save jurisdiction. Because a dispensable, nondiverse party does not exist in this case, the other cases cited by Atlas do not support Atlas' request that the limited partners be dismissed to save jurisdiction. *See Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 827, 830 (1989) (deciding whether the court of appeals could dismiss a dispensable,

nondiverse party); *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 76 (1996) (dismissal of nondiverse party created complete diversity in a removal case). No nondiverse party exists that can be dismissed in this case to save diversity jurisdiction. Therefore, dismissal of the entire case is required.

CONCLUSION

For these reasons, Dataflux requests that this Court grant Defendant's motion to dismiss the lawsuit for lack of subject matter jurisdiction. Defendant further requests all other general and equitable relief to which it may be entitled.

Respectfully submitted,

Mark A. Robertson
State Bar No.
1301 McKinney, Suite 5100
Houston, Texas 77010-3095
Telephone: (713) 651-5151
Telecopier: (713) 651-5246
Attorney-in-Charge for
Dataflux S.A. de C.V.

OF COUNSEL:

Kirk D. Dreyer
State Bar No. 24004624
FULBRIGHT & JAWORSKI L.L.P.
1301 McKinney, Suite 5100
Houston, Texas 77010-3095
Telephone: (713) 651-5151
Telecopier: (713) 651-5246

EXHIBIT A

TEXAS SECRETARY OF STATE,
CORPORATE RECORD

Name: ATLAS GLOBAL GROUP, L.P.

Principal Office: 5847 SAN FELIPE, STE. 4540
HOUSTON, TEXAS 77057

Type of Limited Partnership: DOMESTIC LIMITED PARTNERSHIP

Status: ACTIVE

Status Date: 06/26/1996

Filing Date: 06/26/1996

State of Origin: TEXAS

Registered Office: 5847 SAN FELIPE, STE. 4540
HOUSTON, TEXAS 77057

Prior Names: ATLAS FINANCIAL GROUP, L.P.
Changed: 08/15/1996

General Partners: BAHIA MANAGEMENT, L.L.C.
5847 SAN FELIPE, STE. 4540
HOUSTON, TEXAS 77057

CAPITAL FINANCIAL PARTNER, INC.
5847 SAN FELIPE, STE. 4540
HOUSTON, TEXAS 77057

Appendix H

Number: 00089817-10

History:

Date Transaction

APPENDIX I — PLAINTIFF'S SUR-REPLY TO DEFENDANT'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION FILED NOVEMBER 28, 2000

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

C.A. NO. H-97-3779

ATLAS GLOBAL GROUP, L.P.,

Plaintiff,

vs.

GRUPO DATAFLUX,

Defendant.

PLAINTIFF'S SUR-REPLY TO DEFENDANT'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiff Atlas Global Group, L.P. files this its Sur-Reply to Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction and in support thereof would respectfully show the Court as follows:

I.

1. Contrary to Dataflux's argument in its Response, dismissal of this lawsuit is not required under the law nor would it be judicially efficient under the particular circumstances of this case.

2. Dataflux has failed to address the ***Newman-Green*** considerations in this case. *See* ***Newman-Green, Inc. v. Alfonzo-Larrain***, 490 U.S. 826, 104 L. Ed. 2d 893, 109 S. Ct. 2218 (1989)(holding that "requiring dismissal after years of litigation would impose unnecessary and wasteful burdens on the parties, judges, and other litigants waiting for judicial attention"). The posture of the current case is this: the parties have completed a week-long jury trial and Plaintiff Atlas will file its Motion to Enter Judgment this week.[1] If this Court were to dismiss this lawsuit, Atlas would simply refile in the federal district court against Dataflux. The question would be just how much more time and resources would be spent by the parties and this Court determining these issues a second time. This outcome makes no sense in light of the fact that ***Newman-Green*** provides this Court with a means of salvaging jurisdiction should this Court find it necessary. It is with these situations in mind that the Supreme Court stated that **"once a diversity suit has been tried in federal court . . . considerations of finality, efficiency, and economy become overwhelming."** *See* ***Caterpillar Inc. v. Lewis***, 519 U.S. 61, 75, 117 S. Ct. 467, 476, 136 L. Ed. 2d 437 (1996). Moreover, it is in this type of situation that ***Newman-Green*** gave the Court an alternative mechanism to salvage jurisdiction if necessary: Newman-Green bestows a Court with the power to dismiss a dispensable nondiverse party from a suit. ***Id.*** at 832-33. While Llamosa and Robles were at one time limited partners of Atlas, their limited partnerships in Atlas no longer exists.

1. The parties have come to an agreement with respect to Atlas's attorneys' fees and Atlas is simply waiting on Dataflux to sign the stipulation regarding same. Once Dataflux signs the stipulation, Atlas will file the Motion.

Moreover, Dataflux never contended that these two individuals were indispensable or necessary party Plaintiffs. Former limited partners Llamosa and Robles can be dismissed in their capacity as limited partners to save jurisdiction.

II.

3. In a footnote, Dataflux avers that Atlas attempted to keep the "limited partners secret from this Court, the jury and the defense counsel until its latest filing." *See* Dataflux's Reply to Atlas' Response to Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction at page 3 n.1. This is simply false. Moreover, this is a curious statement in light of the fact that Dataflux sued Mr. Robles and Mr. Llamosa individually. In fact, Dataflux served Robles via the Inter-American Convention on Letters Rogatory and its Additional Protocol, a treaty governing service of process of Mexicans. Dataflux knew what their positions were at Atlas. Dataflux took Robles and Llamosa's depositions and had a full opportunity to discover the limited partners of Atlas. The record in this case speaks for itself: Nothing has been kept "secret" from Dataflux.

4. Exhibit A to Dataflux's Response is an unauthenticated document purporting to be Atlas's corporate record with the State of Texas. Dataflux refers to this document to support its allegation that Atlas has kept its partners "secret" from the State of Texas; Dataflux, however, purposely fails to acknowledge the status date of the record for the partnership, which is **"6/26/96."**

5. This aspersion cast by Dataflux is merely an attempt to divert the Court away from Dataflux's own conduct in this lawsuit: waiting until after a week-long trial and after this Court and the Plaintiff have spent substantial time and resources on this lawsuit and years after they have known the facts about the limited partners' citizenship — to call into question jurisdiction — and force Atlas to jump another hurdle before it recovers what a jury has decided Atlas is owed. While Atlas acknowledges that jurisdiction can be raised at any juncture, sitting on a motion to dismiss for lack of jurisdiction until ***after*** a week-long trial and a jury verdict against one's client is reprehensible conduct.

6. Finally, in contrast to Dataflux's interpretation of the law, under certain circumstances, the citizenship of limited partners can be disregarded for diversity purposes. *See* ***Mallia v. PaineWebber, Inc.***, 889 F. Supp. 277, 283 (S.D. Tex. 1995).

PRAYER

WHEREFORE, PREMISES CONSIDERED Atlas Global Group, L.P. prays that this Court deny Defendant Dataflux's Motion to Dismiss for Lack of Subject Matter Jurisdiction and for such other and further relief, both general and special, at law or in equity, to which Plaintiff may show itself justly entitled to receive.

Respectfully submitted,

s/ Roger B. Greenberg
ROGER B. GREENBERG
State Bar No. 08390000
Attorney-in-Charge
12 Greenway Plaza, 10th Floor
Houston, Texas 77046
Telephone No.: (713) 627-2720
Facsimile No.: (713) 627-7057

OF COUNSEL:

ELIZABETH L. HODGES
State Bar No. 00796710
GREENBERG PEDEN P.C.
12 Greenway Plaza, 10th Floor
Houston, Texas 77046
Telephone No.: (713) 627-2720
Facsimile No.: (713) 627-7057

ATTORNEYS FOR PLAINTIFF AND COUNTERCLAIM DEFENDANTS ATLAS GLOBAL GROUP, L.P., FRANCISCO LLAMOSA AND OSCAR ROBLES

APPENDIX J — NOTICE TO CORRECT IMMATERIAL FACT DATED AND FILED JANUARY 31, 2001

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

C.A. NO. H-97-3779

ATLAS GLOBAL GROUP, L.P.,

Plaintiff

v.

GRUPO DATAFLUX,

Defendant

NOTICE TO CORRECT IMMATERIAL FACT

Plaintiff files this notice and the attached affidavit to correct one fact which is immaterial to any argument advanced in the case. Previously, Plaintiff had informed the Court that there was no question that jurisdiction existed as of the time of trial. That is correct and undisputed. In the affidavit regarding such fact, it was stated that the change took place in April 2000. That is technically incorrect. The contracts governing the transaction under which the ownership changes in the limited partnership took place were executed on or about April 1, 2000, as previously testified. However, it has come to the attention of Plaintiff and Plaintiff's counsel that the contractual documents contained

a condition precedent that was not satisfied until a later date. That condition precedent was satisfied, and the change of ownership became effective on September 8, 2000.

Insofar as the argument about whether there was diversity at the time of trial, this fact is immaterial. The members of the partnership had changed well before trial and there could be no question that diversity existed for more than a month before the case commenced trial. However, Plaintiff felt that the above fact, though immaterial to anything involved in the case, should be corrected on the record before the case proceeded to the next court.

Dated: January 31, 2001.

Respectfully submitted,

s/ Roger B. Greenberg
ROGER B. GREENBERG
s/ David E. Sharp
Attorney-in-Charge
State Bar No. 0839000
Federal I.D. No. 3932
12 Greenway Plaza, 10th Floor
Houston, TX 77046
Telephone: (713) 627-2720
(713) 627-7057 (fax)

Appendix J

OF COUNSEL:

DAVID E. SHARP
GREENBERG PEDEN P.C.
State Bar No. 18115700
Federal I.D. No. 4636
12 Greenway Plaza, 10th Floor
Houston, TX 77046
Telephone: (713) 627-2720
(713) 627-7057 (fax)

ATTORNEYS FOR PLAINTIFFS AND COUNTERCLAIM DEFENDANTS ATLAS GLOBAL GROUP, L.P., FRANCISCO LLAMOSA AND OSCAR ROBLES

Appendix J

EXHIBIT A

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

C.A. NO. H-97-3779

ATLAS GLOBAL GROUP, L.P.,

Plaintiff

v.

GRUPO DATAFLUX,

Defendant

AFFIDAVIT OF ANTONIO MARZIALE

STATE OF TEXAS

COUNTY OF HARRIS

The undersigned, being duly sworn, stated as follows:

"My name is Antonio Marziale. I am over the age of 21, have never been convicted of a crime, and am possessed of sound mind. I have personal knowledge of the matters stated herein.

I am the same Antonio Marziale that previously submitted affidavits in connection with this case.

Appendix J

In my prior testimony by affidavit I described a transaction in April 2000 whereby the ownership of Atlas Global Group, LP changed. It has come to my attention that the documents which effected that transaction, which were executed on or about April 1, 2000, contained a condition precedent to the transfers of ownership becoming effective. That condition precedent was fully satisfied when there was regulatory approval, from the National Association of Securities Dealers Regulation, Inc. ("NASDR"). NASDR approval was granted on September 8, 2000. A copy of the document whereby Atlas Global was informed of that approval is attached hereto as Exhibit "A".

In all other respects, except for the technicality as to the effective date described above, my prior affidavits were true and correct. The above error was completely innocent and inadvertent and this affidavit is being submitted to correct the record. So that the Court may find it easier to follow this change in the record, I have restated below my previous testimony from my last affidavit, correcting only the date upon which the ownership of the Atlas changed.

Plaintiff Atlas Global Group, L.P. ("Atlas"), is a limited partnership created under Texas law and based in Houston, Texas. Atlas is the plaintiff in the lawsuit in which this affidavit is being submitted ("the Lawsuit"). On or about April 1, 2000, the partners of Atlas entered into a transaction and executed all the documents for such transaction under which the

Appendix J

partners of Atlas eventually changed. The documents executed on or about April 1, 2000, for the transaction that eventually changed the ownership of Atlas contained a condition to their effectiveness which was satisfied on September 8, 2000, when there was NASDR approval of the transaction. At all times since September 8, 2000, including when this case was tried during a period spanning October 19-26, 2000, the only partners (both general and limited) of Atlas were: HIL Financial Holdings, L.P., and Capital Financial Partner, Inc. HIL Financial Holdings, L.P., is a Texas limited partnership whose only partners (including both general and limited partners) are OFI Management Inc., and OVH, Inc. OFI Management Inc., and OVH, Inc., are the only partners HIL Financial Holdings, L.P., has had at any time while the Lawsuit has been on file. OFI Management Inc., is and, has been at all times while the Lawsuit has been on file, a corporation incorporated in the State of Delaware and having its principal place of business in Houston, Texas. OVH, Inc., is, and has been at all times while the Lawsuit has been on file, a corporation incorporated in the State of Texas and having its principal place of business in Houston, Texas. Capital Financial Partner, Inc., is, and has been at all times while the Lawsuit has been on file, a corporation incorporated under the laws of the State of Delaware and having its principal place of business in Houston, Texas.

Appendix J

The transaction on or about April 1, 2000, under which the partners of Atlas became, on September 8, 2000, solely HIL Financial Holdings, L.P., and Capital Financial Partner, Inc., did not come about for the purposes of creating jurisdiction in this or any other court. To the contrary, that transaction was done for business reasons that had nothing to do with jurisdiction of the Court over the Lawsuit which was filed by Atlas Global Group, L.P., against Grupo Dataflux and is Cause No. H-97-3779 in the United States District Court for the Southern District of Texas, Houston Division.

From the outset of the case being filed, through completion of trial and the rendering of the jury verdict, Atlas believed that the Lawsuit was properly in federal court and knew of no suggestion or issue to the contrary. Atlas' first information that there was any question or objection raised or suggested by anyone about whether the Lawsuit could be in federal court was not until well after defendant had lost the trial when Atlas learned that the defendant had started to claim that the federal court should not have heard the Lawsuit.

Further affiant sayeth not."

s/ Antonio Marziale
ANTONIO MARZIALE

Appendix J

EXHIBIT B

September 12, 2000

Rafael M. Samano
Atlas Global Group, L.P.
5151 San Felipe, Suite 1550
Houston, TX 77056

RE: Continuing NASD Membership of Atlas Global Group
CRD No. 41567

Dear Mr. Samano:

Pursuant to National Association of Securities Dealers, Inc. ("NASD") Rule 10.4 the District Office staff has approved the firm's change in ownership per your continuing application for membership on September 8, 2000, pursuant to the terms of your Membership Agreement. This letter is to inform you that the District Office staff has received a properly executed Agreement.

If you have any questions, please contact your Core Examiner at (972) 701-8554.

Sincerely,

s/ Christian Zrull
Christian Zrull
Assistant Director